THE DIALOGUE

in English, betweene *a Doctor of Divinity, and a Student in the Laws of England.*

Newly corrected and Imprinted with new *Additions.*

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Cum Privilegio.

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The first Dialogue in English, betwixt *a Doctor of Divinity* and *a Student in the Laws of England*, of the grounds of the said Laws, and of conscience, newly corrected and ofttsoones imprinted with new Additions.

§ *The Introduction.*

A Doctor of Divinity that was of great acquaintance and familiarity with a Student in the Laws of England said thus unto him: I have had great desire of long time to know whereupon the Law of England is grounded: but because the most part of the Law of England is written in the French Tongue, therefore I cannot through mine owne study attaine to the knowledge thereof, for in that Tongue I am nothing expert. And because I have found thee a faithful friend to me, in all my business, therefore I am bold to come to thee before any other to know thy mind, what be the very grounds of the Law of England as thou thinkest.

Stu. That would aske a great leisure, and it is also above my cunning to doe it. Nevertheless, that thou shalt not thinke that I would wilfully refuse to fulfill thy desire, I shall with good will do

that in me is to satisfie thy mind: But I pray thee that thou wilt first shew mee somewhat of other Laws that pertaine most to this matter, and that Doctors treat of, how Laws have begun. And then I will gladly shew thee as me thinketh what be the grounds of the Law of England. *Doct.* I will with good will doe as thou layest: Wherefore thou shalt understand, that Doctors treate of foure Laws, the which (as me seemeth) pertaine most to this matter. The first is the Law Eternall. The second is the Law of Nature of reasonable creatures, the which as I have heard say, is called by them that be learned in the Law of England, the Law of reason. The third is the Law of God. The fourth is the Law of Man. And therefore I wil first treate of the Law Eternall.

Of the Law Eternall.

Cap. 1.

LIke as there is in every artificer a reason of such like things as are to be made by his craft: so likewise it behoveth that in every governor there be reason and a foresight in the governing of such things as shall be ordered & done by him, to them that he hath the governance of. And forasmuch as almighty God is the creator and maker of all creatures, to the which he is compared as a workeman to his workes: and is also the governour of all deeds and movings that bee found in any creature: Therefore as the reason of the wisdome of GOD (inasmuch as creatures be created by him) is the reason and foresight

light of all crafts and works that have been or shall be, so the reason of the wisedome of God moving all things by wisdome made to a good end, obtaineth the name and reason of a law, and that is called the Law eternall.

And this law eternall is called the first law, and it is well called the first, for it was before al other lawes, and all other lawes bee derived of it: whereupon Saint Augustine saith in his 1. Booke of Free arbitrement, that in Temporall Lawes, nothing is righteous ne lawfull, but that the people have derived to them out of the Law eternall. Wherefore every man hath right & title to have that he hath righteously, of the right wise judgement of the first reason, which is the law eternall. Etc. But how may this law eternall be knowne? for as the Apostle writeth in the 5. chapter of his first Epistle to the Corinthians, Quæ sunt Dei nemo scit, nisi spiritus Dei. That is to say, No man knoweth what is in God, but the spirit of God: wherefore it seemeth that he openeth his mouth against heaven that attempteth to know it. Doct. This law eternall no man may know as it is in it selfe, but only blessed souls that see God face to face. But almighty God of his goodnesse sheweth of it as much to his creatures as is necessary for them, for els God should bind his creatures to a thing impossible: which may in no wise be thought in him. Therefore it is to be understood, that 3. manner of wayes almighty God maketh this law eternall knowne to his creatures reasonable. First, by the light of naturall reason. Secondly, by heavenly revelation. Thirdly, by the order of a

Prince or any other secundary governor that hath power to bind his subiects to a law.

And when the law eternall or the will of God is knowne to his creatures reasonable by the light of naturall understanding, or by the light of naturall reason, that is called the law of reason: and when it is shewed by heavenly revelation in such manner as hereafter shall appeare, then it is called the law of God. And when it is shewed unto him by the order of a Prince, or of any other secundary governour, that hath a power to set a Law upon his subiects, then it is called the Law of man, though originally it be made of God. For laws made by man that hath received thereto power of God, be made by God. Therefore the said three Lawes, that is to say, the law of reason, the law of God and the law of man, the which have severall names after the manner as they be shewed to man, be called in God, one law eternall.

And this is the law of which it is written, Proverbiorum octavo, where it is said, Per me reges regnant, & legum conditores iusta decernunt. That is to say, by me Kings raigne, and makers of laws discerne the trouth: and this sufficeth for this time for the law eternall.

§ Of the law of Reason, the which by Doctors is called the law of nature of reasonable creatures.

Cap. 2.

First it is to be understood, that the Law of nature, may be considered in two manners, that

that is to say, generally and specially: when it is considered generally, then it is referred to all creatures, aswell reasonable, as unreasonable, for all unreasonable creatures live under a certaine rule to them given by nature necessary for them to the consideration of their being, but of this Law it is not our intent to treat at this time. The law of nature specially considered: which is also called the Law of reason, pertaineth onely to creatures reasonable, that is, man, which is created to the image of God.

And this Law ought to be kept aswell among Jews and Gentiles, as among Christian men, and this Law is alway good and righteous, stirring and inclining a man to good, and abhorring evill. And as to the ordering of the deeds of man it is preferred before the law of God, and it is written in the heart of every man teaching him what is to be done, and what is to be fled: and because it is written in the heart, therefore it may not be put away, ne it is never changeable by no diversity of place ne time: and therefore against this law, prescription, statute, nor custome, may not prevaile, and if any be brought in against it, they be not prescriptions, statutes, nor customes, but things void and against Justice, and all other Laws: aswell the Laws of God, as to the acts of men, as other, be grounded thereupon.

Stu. Sith the Law of reason is written in the heart of every man, as thou hast said before, teaching him what is to be done, and what is to

be fled, and the which thou sayest may never be put out of their heart, what needeth it then to have any other law brought in, to order the acts and deeds of the people?

Do. Though the law of Reason may not be changed nor wholly put away. Nevertheless before the Law written, it was greatly let and blinded by evill customes, and by many sins of the people, beside our originall sin. Insomuch that it might hardly be discerned what was rightewes, and what unrightous, & what was good, and what evill. Wherefore it is necessary for the good order of the people, to have many things added to the law of reason, aswell by the Church as by secular Princes, according to the manners of the Country and of the people, where such additions should be exercised. And this law of reason differeth from the law of God in two manners. For the Law of God is given by revelation of God, and this law is given by a naturall light of understanding. And also the law of God ordereth a man of it selfe by a nigh way to the felicity that ever shall endure. And the law of reason ordereth a man to the felicity of this life.

Stu. But what be the things that the law of reason teacheth to be done, and what to be fled, I pray thee shew me?

Doct. The law of reason teacheth that good is to be loved, and evill is to be fled. Also that thou sha't doe to another that thou wouldest another should doe to thee. And that we may doe nothing against truth. And that a man must live peacefully with other. That Ju-

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stice is to be done to every man, and also that wrong is not to be done to any man.

And that also a trespasser is worthy to bee punished, and such other: of the which follow divers other secundary commandements, the which be as necessary conclusions, derived of the first. As of that commandement that good is to be beloved, it followeth that a man shall love his benefactour: for a benefactor in that he is a benefactour, includeth in him a reason of goodnesse, for else he ought not to be called a benefactour, that is to say a good doer, but an evill doer. And so in that he is a benefactour, he is to be beloved in all times and in all places. And this law also suffereth many things to be done, as that it is lawfull to put away force with force. And that it is lawfull for every man to defend himself e and his goods against an unlawfull power. And this law runneth with every mans law, and also with the Law of God, as to the deeds of man, and must be alwayes kept and observed, and shall alway declare what ought to follow upon the generall rules of the Law of man, and shall restraine them if they be any thing contrarie unto it.

And here it is to be understood, that, after some men, the Law whereby all things were in common, was never of the Law of Reason, but onely in the time of extreame necessitee. For they say, that the Law of reason may not be changed, but they say it is evident that the Law whereby all things should bee in common, is changed, where one they con-

conclude, that was never the Law of Reason.

§ Of the Law of God.

Cap. 3.

The Law of God is a certaine law given by revelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable bee bound to doe a thing, or not doe it, for obtaining of the felicity eternall. And it is said for the obtaining of the felicity eternall, to exclude the laws shewed by revelation of God for the politicall rule of the people, the which be called Judicials. For a law is not properly called the Law of God, because it was shewed by revelation of God, but also because it directed a man by the neerest way to the felicity eternall, as beene the laws of the old Testament, that beene called Moralls, and the Laws of the Evangelists, the which were shewed in much more excellent maner, then the law of the old Testament was: for that was shewed by the mediation of an Angell: But the Law of the Evangelists, was shewed by the mediation of our Lord Jesu Christ, God and man: and the Law of God is alway righteous and just, for it is made and given after the will of God. And therefore all acts and deeds of man, be called righteous and just, when they be done according to the Law of God, and be conformable to it. Also sometime a Law made by man is called the

law

law of God: As when a law taketh his principall ground upon the Law of God, and is made for the declaration or conservation of the faith, and to put away heresies, as divers laws Canon, and also divers laws made by the common people sometime do. The which therefore are rather to be called the Law of God, then the Law of man. Yet nevertheless, all the Laws Canon bee not the Laws of God: for many of them bee made onely for the politicall rule and conservation of the people. whereupon John Gerson in the treatise of the Spirituall life of the Soule, the second Lesson, and the third Cotollary, saith thus: All the Canons of Bishops nor their decrees bee not the law of God: For many of them bee made onely for the politicall conservation of the people. And if any man will say, Wee net all the goods of the Church spirituall, for they belong unto the spirituality, and lead to the spirituality: wee answere: That in the whole politicall conservation of the people; there be some specially deputed and dedicated to the service of God, the which most specially (as by an excellency) are called spirituall men, as religious men are. And other though they walke in the way of God, yet nevertheless, because their office is most specially to be occupied about such things as pertaine to the Common wealth, and to the good order of the people, they be therefore called secular men or lay men. Nevertheless, the goods of the first may no more bee called Spirituall, then the goods of the other, for they be things meere tem-

temporall, and keeping the body as they doe in the other. And by the like reason, Lawes made for the politicall order of the Church, be called many times spirituall, or the Lawes of God: Nevertheleſſe, it is but unproperly. And other be called civill or the Lawes of man. And in this point many be oft times deceived, and also deceive other, the which judge the things to be spirituall, the which all men know be things temporall and carnall. These be the words of John Gerson in the place alledged before. Furthermore beside the law of reason, and the law of man, it was necessary to have the Law of God, for foure reasons.

The first, because man is ordained to the end of the eternall felicity, the which exceedeth the proportion and faculty of mans power. Therefore it was necessary that beside the law of reason, and the law of man, he should be directed to his end by a Law of God.

Secondly, forasmuch as for the uncertainty of mans judgement, specially of things peculiar and seldome falling, it happened oft times to follow divers judgements of divers men, and diversities of lawes, and therefore to the intent that a man without any doubt may know what he should do, and what he should not do: It was necessary that he should bee directed in all his deeds by a Law heavenly given by God, the which is so apparent, that no man may swerve from it, as is the law of God.

Thirdly, men may onely make a law of such things as he may judge upon, and the judgement of man may not be of inward things, but

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onely of outward things; and nevertheleſſe it belongeth to perfection that a man be well ordred in both, that is to ſay, alſwell inward as outward. Therefore it was neceſſary to have the Law of GOD, the which ſhould order a man alſwell of inward things, as of outward things.

The fourth is, becauſe as Saint Auguſtine ſaith in the firſt booke of free Arbitrement, the law of man may not punith all offences: for if all offences ſhould bee punished, the common wealth ſhould be hurt, as is of contracts. For it cannot be avoided, but that as long as contracts be ſuffered, many offences ſhall follow thereby, & yet they be ſuffered for the common wealth. And therefore that no evill ſhould be unpuniſhed, it was neceſſary to have the Law of God that ſhould leave no evill unpuniſhed.

§ Of the Law of Man.

Cap. 4.

The law of man (the which ſometime is called the law poſitive) is derived by reaſon, as a thing which is neceſſary, & probably following of the Law of reaſon, and of the law of God. And that is called probable in that it appeareth to many, and eſpecially to wiſe men, to be true. And therefore in every law poſitive well made, is ſomewhat of the Law of reaſon, and of the law of God. And to diſcerne the law of God & the law of reaſon from the law poſitive, is very hard. And though it bee hard, yet it is

much necessary in every morall doctrine, and in all laws made for the Common wealth. And that the law of man be just and rightwise, two things be necessary, that is to say: wisdome and authority. wisdome, that hee may judge after reason what is to be done for the Comminalty, and what is expedient for a peaceable conversation and necessary sustentation of them. Authority, that he have Authority to make Laws. For the law is derived of Ligare, that is to say, to bind. But the sentence of a wise man doth not bind the comminalty, if he have no rule over them. Also to every good law bee required these properties, that is to say, that it be honest, rightwise, possible in it selfe, and after the custome of the country, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious: by any darke sentences, ne mixt with any private wealth, but all made for the common wealth. And after Saint Bridget in the 4. Booke in the hundred twenty nine chapter, Every good law is ordained to the health of the soul, and to the fulfilling of the laws of God, and to induce the people to flie evill desires, and to doe good workes. Also the Cardinall of Cameres writeth, whatsoever is righteous in the law of Man, is righteous in the law of God. For every mans law must be consonant to the law of God. And therefore the Lawes of Princes, the commandements of Prelates, the Statutes of Comminalities, neyget the Ordinance of the Church is not righteous nor obligatory, but it be consonant to the law of God.

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And of such a law of man that is consonant to the law of God, it appeareth who hath right to lands and goods, and who not: For whatsoever a man hath by such laws of man, her hath right onely. And whatsoever he hath against such laws, is unrighteously had.

For laws of man not contrary to the law of God, nor to the law of reason, must bee observed in the law of the soule: and hee that despiseth them, despiseth God, and resisteth God. And furthermore, as Gratian saith, because evil men feare to offend for feare of paine: Therefore it was necessary that divers pains should be ordained for divers offences, as Physitians ordained divers remedies for severall diseases. And such paines bee ordained by the makers of laws, after the necessity of the time, and after the disposition of the people. And though that law that ordained such paines hath thereby a conformity to the law of God, (for the law of God commandeth that the people shall take away evill from amongst themselves) yet they belong not so much to the law of GOD, but that other paines (standing the first principles) might be ordained and appointed therefore, that is the law that is called most properly the Law Positive, and the Law of man.

And the Philosopher said in the third book of his Ethikes, that the intent of a maker of a law is to make the people good, and to bring them to vertue. And although I have somewhat in a generall shewed thee wherupon the Law of Eng-

England is grounded (For of necessity it must be grounded of the said laws, that is to say, of the law Eternall, of the Law of Reason, and of the law of God) Neverthelesse, I pray thee shew me more specially whereupon it is grounded as thou thinkest, as thou before hast promised to doe.

Stu. I will with good will doe therein that lyeth in mee, for thou hast shewed mee a right, plain and straight way thereto. Therefore thou shalt understand, that the law of England is grounded upon six principall grounds. First it is grounded on the Law of Reason. Secondly, on the Law of God. Thirdly, on divers generall Customes of the Realme. Fourthly, on divers Principles that be called Maximes. Fiftly, on divers particular Customes. Sixtly, on divers Statutes made in Parliaments by the King, and by the Common Counsell of the Realme. Of which grounds I shall speake by order as they be rehearsed before. And first of the Law of Reason.

Of the first ground of the Law of England.

Cap. 5.

Good's A. Cap. 4.

The first ground of the Law of England is the Law of Reason, whereof thou hast treated before in the 2. Chap. the which is kept in this Realme, as it is in all other Realmes, & as of necessity it must needs be (as thou hast said before.) D. But I would know what is called the law of Nature after the laws

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of England. St. It is not used among them that be learned in the Lawes of England to reason what thing is commanded or prohibited by the law of nature, & what not, but all the reasoning in that behalf is under this manner. As when any thing is grounded upon the law of nature, they say, that reason will that such a thing done, and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. Doct. Then I pray thee shew me what they that be learned in the lawes of the realme hold to be commanded or prohibited by the law of nature, under such termes and after such manner as is used among them that be learned in the said lawes.

St. There be put by them that be learned in the lawes of England two degrees of the Law of Reason, that is to say, the law of reason primary, & the law of reason secundary: by the law of reason primary be prohibited in the lawes of England, murder (that is, the death of him that is innocent) perjury, deceit, breaking of the peace, & many other like. And by the same law also it is lawfull for a man to defend himself against an unjust power, so he keep due circumstance. And also, if any promise be made by man, as to the body, it is by the law of reason void in the lawes of England. The other is called the law of secundary reason, the which is divided into two branches, that is to say, into the law of secundary reason generall, and into a law of secundary reason particular. The law of a secundary reason generall, is grounded and derived of the general lawes or generall

cuſtome of property, whereby goods moueable and vnmoueable be brought into a certain property, ſo that euery man may know his owne thing. And by this branch bee prohibited in the Lawes of England diſſeiſins, treſpaſſe in lands and goods, reſcouſſe, theft, vnlawfull withholding of another mans goods, and ſuch other. And by the ſame law it is a ground in the law of England, that ſatisfaction muſt be made for a treſpaſſe, and that reſtitution muſt be made of ſuch goods as one man hath that belong to another man, the debts muſt be paid, couenants fulfilled, and ſuch other. And becauſe diſſeiſins, treſpaſſe in lands and goods, theft, and other, had not been knowen, if the law of property had not been obtained: therefore all things that be derived by reaſon out of the ſaid law of Property, be called the law of Reaſon ſecundary generall, for the law of Property is generally kept in all Countries.

The law of Reaſon ſecondary particular, is the law that is derived vpon diuers Cuſtomes generall and particular, and of diuers Maximes and Statutes ordained in this realme. And it is called the law of reaſon ſecundary particular, becauſe the reaſon in that caſe is deriued by ſuch a law that is onely holden for law in this realm, and in none other realm.

Doct. I pray thee ſhew me ſome ſpeciall caſe of ſuch a law of Reaſon ſecundary particular for an example. St. There is a law in England, which is Law of cuſtome, that if a man take a Diſtreſſe lawfully, that he ſhall put it in pound overt, there to remain till he be ſatis-

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fied of that he distrained for. And then thereupon may be asked this question, That if the beasts die in pound for lack of meat, at whose perill die they, whether die they at the perill of him that distrained, or of him that oweth the beasts? D. If the law be as thou saiest, and that a man for a iust cause taketh a distresse, and putteth it in the pound overt, and no law compelleth him that distreineth to give them meat, then it seemeth of reason that if the distresse die in pound for lack of meat, that it died at the perill of him that oweth the beasts, and not of him that distrained, for in him that distrained there can be assigned no default, but in the other may be assigned a default, because the rent was unpaid. Stu. Thou hast given a true judgement, and who hath taught thee to do so, but reason derived of the said generall customes? And the law is so full of such secundary reasons derived out of the generall Customes and Maximes of the realm, that some men have affirmed that all the law of the realm is the law of reason. But that cannot be proved as me seemeth, as I have partly shewed before, and more fully will shew after. And it is not much used in the Laws of England, to reason what law is grounded upon the law of the first reason primary, or on the Law of reason secundary, for they be most commonly openly known of themselves, but for the knowledge of the Law of reason secundary is greater difficulty, and therefore therein dependeth much the manner and form of arguments in the Laws of England.

And it is to be noted that all the deriving of Reason in the Law of England proceedeth of the first principles of the law, or of something that is derived of them: and therefore no man may right wisely judge ne groundly reason in the laws of England, if he be ignorant in the first principles. Also all birds, fowles, wild beasts of Forrests & Warren, and such other be excepted by the Laws of England, out of the said generall law and custome of property. For by the laws of the realme, no property may be of them in any person, unles they be tame. Neverthelesse the egs of Hauks, Herons, or such other as build in the ground of any person, be adjudged by the said Laws to belong to him that oweth the ground.

Of the second ground of the Law of England.

Cap. 6.

The second ground of the law of England is the law of God, & therefore for punishment of them that offend against the law of God, it is enquired in many Courts in this Realme, if any hold any opinion secretly or in any other manner against the true Catholike Faith: and also if any generall custome were directly against the law of God, or if any statute were made directly against it: as it were ordained that no almes should be given for no necessity, the custom & statute were void. Neverthelesse the statute made in the 34. year of King Ed. 3 whereby it is ordained that no man under paine of imprisonment shall give any almes to any

any valiant beggers that may well labor, that they may so be compelled to labor for their living, is a good statute, for it observeth the intent of the law of God. And also by authority of this law, there is a ground in the laws of England, that he that is Accursed shall maintain no action in the Kings Court, except it be in very few cases, so that the same excommunication be certified before the Kings justices in such manner as the Law of the Realm hath appointed: and by the authority also of this ground, the law of England admitteth the spirituall jurisdiction of Dismes and offerings, and of all other things that of right belong unto it, and receiveth also all laws of the Church duely made, and that exceed not the power of them that made them. Insomuch that in many cases it behoveth the Kings Justices to judge after the laws of the Church. D. How may that be be, that the Kings Justices should judge in the Kings Courts after the law of the Church? for it seemeth that the Church should rather give judgement in such things as it may make laws of, then the Kings Justices. St. That may be done in many cases, whereof I shall for example put this case. If a writ of right of ward be brought of the body, &c. and the tenant confessing the tenure, & the nonage of the infant, saith, that the infant was married in his ancestors days, &c. whereupon 12. men be sworn, which give this verdict, that the infant was married in the life of his ancestors, and that the woman in the life of his ancestor sued a divorce, whereupon sentence was given that they should be divorced, and that the

heire appealed, which hangeth yet undiscussed, praying the aid of the Justice to know whether the infant in this case shall be said married or no. In this case if the law of the Church be that the said sentence of Divorce standeth in his strength and vertue untill it be annulled upon the said appeal: That the Infant at the death of his ancestor was unmaried, because the first mariage was annulled by that divorce: and if the law of the church be, that the sentence of the divorce standeth not in effect till it be affirmed upon the said appeale, then is the infant yet married, so that the value of his marriage cannot belong unto the Lord, and therefore in this case judgment conditional shall be given, &c. and in like wise the Kings Justices in many other cases shall judge after the law of the Church, like as the spirituall Judges must in many cases form their judgment after the kings laws.

D. How may that be, that the spirituall Judges should judge after the kings laws? I pray thee shew me some certain case thereof. Stud. Though it be somewhat a digression from our first purpose, yet I will not withstay thy desire, but will with good will put thee a case or two thereof, that thou maist the better perceive what I mean. If A. & B. have goods joyntly, and A. by his last will bequeath his portion therein to C. & maketh the said B. his Executor and dieth, & C. asketh the execution of this will in the spirituall court: in this case the Judges there be bound to judge that will to be void, because it is void by the laws of this Realme. And likewise if a man be outlawed, and after

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by his will bequeath certain goods to John at Stile, & make his executors and die, the King seiseth his goods and after giveth them again to the executors, & after I at Stile sueth a citation out of the spirituall court against the executors, to have execution of the will: in this case the Judges of the spirituall court must judge the will to be void, as the law of the realm is that it is, and yet there is no such law of forfeiture of goods by outlawry in the spirituall law.

Of the third ground of the Law of England. Cap. 7.

THe third ground of the Law of England standeth upon divers generall Customes, of old time used through all the realme, which have been accepted and approved by our soveraign Lord the K. and his progenitors, and all his subjects: & because the said customs be neither against the Law of God, nor the Law of reason, and have been alway taken to be good and necessary for the commonwealth of all the Realme; Therefore they have obtained the strength of the law, insomuch that he that doth against them, doth against Justice: and these be the customs that properly be called the Common Law: and it shall alway be determined by the Justices whether there be any such generall customs or not, and not by 12 men: and of these generall customes, and of certain principles that be called Maximes, which also take effect by the old custome of the Realm (as shall appear in the Chapter next following) dependeth most part of the law of this Realme.

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And therefore our Soveraign Lord the King at his Coronation among other things taketh a solemn oath, that he shall cause all the customs of his realm faithfully to be observed. Do. I pray thee shew me some of these generall customs. St. I will with good will, and first I shall shew thee how the custome of the Realm is the very ground of divers Courts in the Realm, that is to say, of the Chauncery, of the K. bench, of the Common pleas, and the Exchequer, the which be Courts of Record, because none may sit as Judges in these courts but by the Kings letters patents. And these Courts have divers authorities, whereof it is not to treat at this time. Other Courts there be also only grounded by the custom of the realm, that be of much lesse authority then the Courts before rehearsed. As in every shire within the realm, there is a court that is called the county, and another that is called the sheriffs Torn, and in every manor is a court that is called a court Baron, and to every fair and market is incident a Court that is called a Court of Pipowders. And though in some statutes is made mention sometime of the said Courts, yet nevertheless of the first institution of the said courts, and that such Courts should be, there is no statute nor law written in the laws of England. And so al the ground and beginning of the said Courts depend upon the custom of the realm, the which custom is of so high authority, that the said Courts ne their authorities may not be altered, ne their names changed without Parliament.

Also

Also by the old custom of the Realm, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land: and this custom is confirmed by the statute of Magna Charta. cap. 26.

Also by the old custom of the Realm, all men great and small shall do and receive justice in the Kings Courts, and this custom is confirmed by the statute of Marlb. cap. 1.

Also by the old custome of the Realm, the eldest sonne is onely heire to his Ancestor, and if there be no sons but daughters, then all the daughters shall be heires. And so it is of sisters and other kinswomen. And if there be neither son, daughter, brother, nor sister, then shall the inheritance descend to the next kinsman or kinswoman of the whole bloud to him that had the inheritance, of how many degrees soe'oer they be from him. And if there be no heir generall nor speciall, then the land shall escheat to the Lord of whom the Land is holden.

Also by the old custom of the Realm, lands shall never ascend or descend from the son to the father or mother, nor to to any other ancestor in the right line, but it shall rather escheat to the Lord of the fee.

Also if any Alien have a son that is an Alien, and after is made Denizen, and hath an other son, and after purchaseth lands and dyeth, the youngest son shall inherit as heir, and not the eldest.

Also if there be three brethren, and the middest brother purchase Lands and dieth without heire of his body, the eldest brother shall inherit as

as heir to him, and not the younger brother.

And if land in fee simple descend to a man by the part of his father, and he dieth without heir of his body, then the inheritance shall descend to the next heir of the part of his father. And if there be no such heir of the part of his father, then if the father purchaseth the lands, it shall go to the next heir of the fathers mother, & not to the next heir of the sons mother, but it shall rather escheat to the Lord of the fee. But if a man purchase lands to him and to his heirs, and die without heir of his body, as is said before, then the land shall descend to the next heir of the part of his father, if there be any, and if not, then to the next heir of the part of his mother.

Also the son purchaseth lands in fee, and dieth without heir of his body, the Land shall descend to his uncle, and shal not ascend to his father: But if the father have a son, though it be many years after the death of the elder brother, yet that son shall put out his uncle, and shall enjoy the Land as heir to the elder brother for ever.

Also by the custome of the Realm, the child that is born before espousals is Bastard, and shall not inherit.

Also the custome of the realm is, that no maner of goods nor chattels reall nor personall shall never go to the heir, but to the executors, or to the Ordinary, or administrators.

Also the husband shall have all the chattels personals that his wife had at the time of the espousals or after, and also chattels reall if he overlive his wife: But if he sell or give away the

the chattels reals & die, by that sale or gift the interest of the wife is determined, or else they shall remain to the wife, if she overlive her husband: also the husband shall have all the inheritance of his wife, whereof he was seised in deed in the right of his wife during the espousals in fee, or in fee tail generall for term of life, if he have any childe by her, to hold as tenant by the curtesie of England, and the wife shall have the third part of the inheritance of her husband, whereof he was seised in deed or in law after the espousals, &c. But in that case the wife at the death of her husband must be of the age of nine year or above, or else she shal have no dowry. D. what if the husband at his death be within the age of nine years? S. I suppose she shal yet have her dower: also the old Law & custome of the Realm is, that after the death of every tenant that holdeth his land by Knights service, the Lord shall have the ward and marriage of the heir, till the heir come to the age of 21 years, and if the heir in that case be of full age at the death of his ancestor, then he shall pay to his Lord his relief, which at the Common law was not certain, but by the stat. of Mag. ch. it is put in certain: that is to say, for every whole knights fee to pay C.s. and for a whole Barony to pay a C. marks for relief, and for a whole Earldome to pay a C.l. and after the rate. And if the heir of such a tenant be a woman, & she at the death of her ancestor be within the age of 14. years, then by the common law she should have bin in ward onely till 14. years, but by the stat. of W. 1. in such case she shall be in ward till 16. years.

And

And if at the death of her ancestor she be of the age of 14 years or above, she shall be out of ward, though the land be holden of the King, & then she shall pay relefe as an heir male shall.

Also of lands holden in Socage, if the ancestor die, his heire being within the age of 14 years, the next friend of the heire to whom the inheritance may not descend shal have the ward of his body and lands, till he shall come to the age of 14. years, and then he may enter. And when the heir commeth to the age of 21 years then the gardein shall yeeld him an accompt for the profits thereof by him received.

Also, such an heir in socage for his relefe shall double his rent to the Lord the year following the death of his ancestor: As if his ancestor held by xij. d. rent, the heir in the year following shall pay the xij.d. for his rent, and other xij.d. for his relefe, and the relefe he must pay, though he be within age at the death of his ancestor.

Also there is an old Law and Custome in this realm, that a free-hold by way of feoffement, gift, or leafe, passeth not without Livery of seisin be made upon the land according though a deed of Feoffement be thereof made & delivered: But by way of surrender, partition, and eschange, a freehold may passe without livery.

Also if a man make a will of land, whereof he is seised in his demesne as of Fee, that will is void: but if it had stood in Feoffees hand, it had been good. And also in London such a will is good by the custom of the city, if it be inrolled.

Also a leafe for term of years is but a chattel

by

by the law, and therefore it may passe without any livery of seisin: but otherwise it is of a state for term of life, for that it is a Freehold in the Law, and therefore livery must be made, or else the Freehold passeth not.

Also by the old custome of the realm, a man may distrain for rent service of common right: and also for a rent reserved upon a gift in tail, a lease for term of life, of years, and at will, and in such case the Lord may distrain the beasts of tenants assoon as they come upon the ground, but the beasts of strangers that come in but by maner of an escape, he may not distrain till they have been levant & couchant upon the ground: but for debt upon an Obligation, nor upon a contract, nor for account, ne yet for arrerages of account, nor for no maner of trespasse, reparations, nor such other no man may distrain.

And by the old Customs of the realm all issues that shall be joyned between party and party in any court of record within the realm, except a few whereof it needeth not to treat at this time, must be tried by xii. free and lawfull men of the visn, that be not of affinity to none of the parties: and in other Courts that be not of record, as in the county, court baron, hundred, & such other like, they shall be tried by the oath of the parties, & not otherwise, unlesse the parties assent that it shall be tried by the homage. And it is to be noted, that lords, barons, & al peers of the realm be excepted out of such trials if they will, but if they will wilfully be sworn therein, some say it is no errour: and they may if they will have a writ out of the Chancery di-

rected

reted to the sheriffe, commanding him that he shall not empannell them upon no enquest.

And of this that is said before it appeareth, that the customes aforesaid nor other like unto them, whereof be very many in the lawes of England, cannot be proved to have the strength of law only by reason. For how may it be proved by reason that the eldest son shall only inherit his father, and the younger to have no part, or that the husband shall have the whole land for term of his life as tenant by the curtesie, in such manner as before appeareth, and that the wife shall have onely the third part in the name of the dower, and that the husband shall have all the goods of his wife as his owne, and that if he die living the wife, that his executors shall have the goods, and not the wife: all these and such other cannot be proved only by reason that it should be so and no other wise, although they be reasonable, and that with the customs therein used sufficeth in the Law, and a statute made against such generall customes ought to be observed, because they be not merely the law of reason.

Also the law of property is not the law of reason, but the law of customs, howbeit that it is kept, it is also most necessary to be kept in all realms, and among all people, and so it may be numbred among the generall customes of the realm, and it is to understand that there is no statute that treateth of the beginning of the said customs, nor why they should be holden for law, and therefore after them that be learned in the lawes of the realm, the old custome of the realm

is

is the onely and sufficient authority to them in that behalf: and I pray thee shew me what Doctors hold therein, that is to say, whether a custome onely be a sufficient authority of any Law. Do. Doctors hold that a Law grounded upon a custome is the most surest Law, but this thou must always understand therewith, that such a custome is neither contrary to the law of reason, nor the law of God. And now I pray thee shew me somewhat of the Maxims of the Law of England, whereof thou hast made mention before in the 4. Chapter. Stu. I will with good will.

Of the 4. ground of the Law of England. Cap. 8.

THe 4. ground of the law of England standeth in divers principles that be called in the law Maxims, the which have been always taken for law in this realm, so that it is not lawfull for any that is learned to deny them: for every one of those Maxims is sufficient authority to himself. And which is a Maxime, and which not, shall alway be determined by the Judges, and not by other men. And it needeth not to allign any reason, why they were first received for Maximes, for it sufficeth that they be not against the Law of reason, nor the law of God, & that they have alway been taken for a law. And such Maximes be not only holden for law, but also other cases like unto them, and all things that necessarily follow upon the same, are to be reduced to the like law, & therefore most commonly there be alligned some reasons

a Wo. fol. 5

sons or consideration why such Maximes be reasonable, to the intent that other cases like may the more conveniently be applied to them. And they be of the same strength and effect in the law as statutes be. And though the generall customs of the Realm, be the strength and warrant of the said Maxims, as they be of the generall customes of the realm, yet because the said generall customs be in maner knowen through the Realm, aswell to them that be unlearned as learned, and may lightly be had and knowen, and that with little study; and the Maximes be only knowen in the Kings Courts, or among them that take great study in the Law of the Realm, and among few other persons: therefore they be set in this writing for severall grounds, and he that listeth may so accompt them, or if he will, he may take them for no ground, after his pleasure. Of which Maximes I shall hereafter shew thee part.

First, there is a Maxime, that Escuage uncertain maketh Knights service.

Also there is another Maxime, that Escuage certain maketh socage.

Also, that he that holdeth by Castle-gard holdeth by Knights service, but he holdeth not by Escuage. And that he that holdeth by xx. s. to the gard of a Castle, holdeth by socage.

Also there is a Maxime, that a Discent taketh away an entry.

Also, that no Prescription in lands maketh a right.

Also, that a Prescription of rent and profits appender out of Land maketh a right.

Also,

Also that the limitation of a prescription generall taken, is from the time that no mans minde runneth to the contrary.

Also that assignes may be made upon lands given in fee, for terme of life, or for terme of yeares though no mention be made of assignes: and the same law is of a rent that is granted, but otherwise it is of a warranty and of a covenant.

Also that a condition to avoyd a freehold cannot be pleaded without deed, but to avoyd a gift of chattell it may bee pleaded without deed.

Also that a release or confirmation made by him that at the time of the release or confirmation made had no right, is voyd in the Law, though a right come to him after, except it bee with warranty, and then it shall bar him of all right that hee shall have after the warranty made.

Also that a right or title of action that onely dependeth in action, cannot be given nor granted to none other but onely to the tenant of the ground, or to him that hath the reversion or remainder of the same.

Also that in an action of debt upon a contract the defendant may wage his Law, but otherwise it is upon a lease of Lands for terme of yeeres, or at will.

Also if that any exigent in case of felony bee awarded against a man: he hath thereby forthwith forfeited his goods to the King.

Also if the sonne be attainted in the life of the father, and after he purchaseth his charter

of pardon of the King, and after the father dyeth: In this case the land shall escheat to the Lord of the fee, in so much that though he have a younger brother, yet the land shall not descend to him: for by the attainder of the elder brother the blood is corrupt, and the father in law, dyed without heir.

Also if an Abbot or Prior alien the Lands of his house and dyeth, in this case, though his successor have right to the lands, yet he may not enter, but he must take his action that is appointed h m by law.

Also, there is a Maxim in the law, that if a villain purchase lands, and the Lord enter, he shall in joy the land as his own: but if the villain alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steal goods to the value of twelve pence or above, it is felony, and he shall die for it. And if it be under the value of twelve pence, then it is but petite larceny, and he shall not dye for it, but shall be otherwise punished after the discretion of the Judges, except it be taken from the Person: for if a man take any thing how little soever it be, from a man's person feloniously, it is called robbery, and he shall die for it.

Also, he that is arraigned upon an Indictment of Felony, shall be admitted in favour of life to challenge xx. Jurors peremptorily: but if he challenge any above that number, the Law taketh him as one that hath refused the Law, because he hath refused those lawful Enquests, and therefore he shall dye:

with cause he may challenge as many as hee hath cause of challenge to. And further it is to be understood that such peremptory challenge shall not be admitted in appeal, because it is at the suits of the party.

Also, the land of every man is in the Law enclosed from other, though it lye in the open field. And therefore if a man do trespas therein, the writ shall be Quare clausum fregit.

Also, the rents, commons of pasture, of turbary, reversions, remainders, nor such other things which lye not in manuall occupation, may not be given nor granted to none other without writing.

Also that he that recovereth debt or damages in the Kings Courts by such an action wherein a Capias lay in the Processe, may within a year after the recovery, have a Capias ad satisfaciendum to take the body of the defendant, and to commit him to prison till he have paid the debt and damages: but if there lay no Capias in the first action, then the plaintiffe shall have no Capias ad satisfaciendum, but must take a Fieri facias, or an Elegit within the year or a Scire facias after the year, or within the year if he will.

Also, if a release or confirmation be made to him, that at the time of the release made had nothing in the Land, &c. the release or confirmation is void, except in certain cases, as to touch, and certain other which need not here to be remembred.

Also there is a Maxime in the Law of England, that the King may disseise no man, nor

that no man may disseise the King, ne pull any reversion or remainder out of him.

Wood. 21

Also the Kings excellencie is so high in the law, that no freehold may be given to the King, ne be derived from him, but by matter of Record.

Also there was sometime a Maxime and a Law of England, that no man should have a writ of right, but by speciall suit to the King, & for a fine to be made in the Chancery for it. But these Maximes be changed by the stat. of Magna charta chap. 16. where it is said thus, Nulli negabimus, nulli vendemus rectum vel justitiam. And by the words Nulli negabimus a man shall have a writ of right of course in the Chancerie without suing to the King for it. And by the words Nulli vendemus, he shall have it without fine: and so many times the old Maximes of the Law be changed by statutes. Also though it be reasonable, that for the manifold diversities of actions, that be in the Lawes of England, that there should bee diversities of Proces, as in the reall actions after one manner and in personall actions after another manner: Yet it cannot be proved mercely by reason that the same Proces ought to be had and none other: for by Statute it might be altered. And so the ground of the said procesle is to be referred onely to the Maximes and Customes of the Realme.

And I have shewed thee these Maximes before rehearsed, not to the intent to shew the speciall what is the cause of the law in them, for that would aske a great respite. But I

have shewed them only to the intent that thou maist perceive that the said Maximes and other like, may bee conveniently set for one of the grounds of the Lawes of England. Moreover there be diverse cases, whereof I am in doubt whether they be only Maximes of the law, or that they be grounded upon the law of reason, wherein I pray thee let me heare thine opinion

Do. I pray thee shew those cases that thou meanest: and I shall make thee answer therein as I shall see cause.

Hereafter follow divers cases, wherein the Student doubteth whether they be onely Maximes of the Law, or that they be grounded upon the Law of Reason.

Chap. 9.

THe law of England is, that if a man command another to do a trespasse, and he doth it, that the commander is a trespasser.

And I am in doubt whether that it bee onely by a Maxime of the Law, or that it be by the Law of reason.

Also, I am in doubt upon what Law it is grounded, that the Accessory shall not be put to answer before the principall, &c.

Also, the law is that if an Abbot buy a thing that commeth to the use of the house, and dieth, that his successor shall be charged. And I am somewhat in doubt upon what ground that

Law preventeth.

Also, that he that hath possession of land, though it be by disseisin, hath right against all men but against him that hath right.

Also, that if an action reall be sued against any man that hath nothing in the thing demanded, the writ shall abate at the common Law.

Also, that the alienation of the tenant hanging the writ, nor his entry into religion, or if he be made a Knight, or if she be a woman and take an husband hanging the writ, that the writ shall not abate.

Also, if land and rent that is going out of the same land, come into one mans hand of like estate, and like surety of title, the rent is extinct.

Also, if land descend to him that hath right to the same land before, he shall be remitted to his better title if he will.

Also, if two titles be concurrent together, that the eldest title shall be preferred.

Also, that every man is bound to make recompence for such hurt as his beasts shall do in the corne or grasse of his neighbour, though he knowe not that they were there.

Also, if the demandant or plaintiffe hanging his writ, will enter into the thing demanded, his writ shall abate. And it is many times very hard and of great difficulty to know what cases of the Law of England be grounded upon the Law of reason, and what upon customs of the Realme: and though it be hard to discusse it, it is very necessary to be knowne, for the knowledge of the perfect reason of the

Law: and if any man thinke that these cases before rehearsed be grounded upon the law of reason, then he may refer them to the first ground of the law of England, which is the law of reason, whereof is made mention in the 5. chapter. And if any man thinke that they be grounded upon the law of custome: then he may retorte them to the Maxims of the law, which be assigned for the fourth ground of the law of England, whereof mention is made in the 8. Chapter, as before appeareth.

Do. But I pray thee shew me by what authoritie it is proved in the lawes of England, that the cases which thou hast put before in the 8. Chapter, and such other which thou callest Maxims, ought not to be denied, but ought to be taken as Maximes. For sith they cannot be proved by reason, as thou agreest thy selfe they cannot, they may as lightly be denied as affirmed, unles there be some sufficient authority to approve them.

Stu. Many of the Customes and Maximes of the Lawes of England be knowne by the use and the custome of the realme so apparently, that it needeth not to have any Law written thereof. For what needeth it to have any Law written that the eldest sonne shall inherit his father: or that all the daughters shall inherite together as one heire, if there bee no sonne: or that the husband shall have the goods and chattels of his wife that she hath at the time of the espousels, or after: or that a bastard shall not inherite as heire: or the executors shall have the disposition of all the goods of

their testator: and if there be no executors, that the Ordinary shall have it, and the heire shall not meddle with the goods of his ancestor, but if any particular customes helpe him.

Wa. 5. The other Maximes and customes of the law that be not so openly knowen among the people may be knowen partly by the Law of Reason, and partly by the bookes of the Lawes of England called Yeares and Termes, and partly by divers Records remaining in the K. Courts and in the Treasurie: and specially by a book called the Register, and also by divers statutes wherein many of the said Customes and Maximes be oft recited, as to a diligent Searcher will evidently appeare.

Of the fift ground of the Law of England.

Cap. 10.

Wa. 5. The fift ground of the Law of England standeth in divers particular customes used in divers counties, townes, cities, & Lordships in this realme, the which particular customes, because they be not against the law of reason, nor the law of God, though they bee against the said generall Customes or Maximes of the Law, yet nevertheless they stand in effect and be taken for law: but if it rise in question in the Kings courts, whether there be any such particular customs or not, it shall be tried by xii men, and not by the Judges, except the same particular customs bee of Record in

the same Court. Of which particular Customes, I have hereafter noted some for an example.

First, there is a custome in Kent that is called Gavelkind, that all the brethren shall inherit together, as sisters at the Common Law.

Also there is another particular Custome, that is called Burghenglish, where the younger sonne shall inherit before the eldest, and that custome is in Nottingham.

Also there is a custome in the Citie of London, that freemen there, may by their testament inrolled, bequeath their lands that they be seised of to whom they will, except to Mortmain. And if they be Citizens and Freemen that they may also bequeath their Lands to Mortmaine.

Also in Gavelkind, though the Father bee hanged, the sonne shall inherit. For their custome is, The Father to the bough, the Sonne to the plough.

Also in some Countries the wife shall have the halfe of the husbands lands in the name of her dowry, as long as shee liveth sole.

And in some Country the husband shall have the halfe of the inheritance of his wife, though he have no issue by her.

Also in some Country an Infant when hee is of age of xv. yeers may make a feoffement, and the feoffement good. And in some Country when he can mete an ell of cloth.

Of the first ground of the Law of England.

Chap.

Cap. 11.

The first ground of the Law of England standeth in divers statutes made by our Soveraign Lord the King and his progenitors, and by the Lords spirituall & temporall, and the Commons in divers Parliaments, in such cases where the law of reason, the law of God, Customes, Maximes, ne other grounds of the law seemed not to be sufficient to punish evill men, and to reward good men. And I remember not, that I have seene any other grounds of the Law of England, but onely these that I have before remembred. Furthermore it appeareth of that I have said before, that oft times two or three grounds of the law of England must be joyned together, or that the plaintif can open & declare his right, as it may appeare by this example. If a man enter into another mans land by force, and after maketh feoffement for maintenance to defraud the plaintiffe from his action: In this case it appeareth that the said unlawfull entrie is prohibited by the Law of reason, but the plaintiffe shall recover treble dammages, that is by reason of the statute made in the 8. yeare of King H. 6. chap. 9. And that the dammages shal be tried by xii. men, that is by the custom of the realm. And so in this case, three grounds of the law of England ma ntain the plaintiffes action.

And so it is in divers other cases that need not to be remembred now. And thus I make an end for this time to speak any further of the grounds of the law of England. D. I thanke thee

ther for the great paine that thou hast taken therein. Nevertheless, forasmuch as it appeareth that thou hast said before, that the learned men of the Law of England pretend to verifie, that the Law of England will nothing doe, ne attempt against the Law of Reason, nor the Law of God, I pray ther answer me to some questions grounded upon the Law of England, how, as thou thinkest, the Law may stand with reason or conscience in them.

St. Put the case, and I shall make answer therein as well as I can.

The first question of the Doctor, of the Law of England and Conscience.

Chap. 12.

I have heard say, that if a man that is bound in an Obligation pay the money, but he taketh no acquittance, or if he take one and it happeneth him to lose it, that in that case he shall be compelled by the Lawes of England to pay the money againe. And how it may be said then, that that Law standeth with reason and conscience? for as it is grounded upon the Law of Reason, that debts ought of right to be payed, so it is grounded upon the Law of Reason (as it seemeth) that when they be payed, that he that payed them should be discharged. Stu. First, thou must understand, that it is not the Law of England, that if a man that is bound in an Obligation pay the money without acquittance, or if he

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he take acquittance and leese it, that therefore the law determineth that hee ought of right to pay the mony effsoones, for that law were both against reason and conscience. But though it is so, that there is a generall Maxime in the law of England, that in an action of debt sued upon an Obligation, the defendant shall not plead that he oweth not the mony, ne can in no wise discharge himselfe in that action, but hee have acquittance or some other writing sufficient in the Law, or some other thing like, witnessing that he hath paid the mony: that is ordained by the Law to avoyd a great inconvenience that else might happen to come to many people: that is to say, that every man by a Nude parol, and by a bare Averrement should avoyd an Obligation. Wherefore to avoyd that inconvenience, the Law hath ordained, that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writing, or by some other thing of as high authority as the Obligation is. And though it may follow thereupon, that in some particular case a man by occasion of that generall Maxime may be compelled to pay the money againe that he payd before: Yet nevertheless, no default can be thereof assigned in the Law. For like as makers of Law take heed to such things as may oft fall, and do much hurt among the people, rather than to particular cases: So in like wise the generall grounds of the law of England, heed more what is good for many, than what is good for one singular person onely. And because it should be a hurt to many,

if

if an Obligation should bee so lightly avoyded by word, therefore the law specially preventeth that hurt under such manner as before appeareth: and yet intendeth not, nor commandeth not, that the money of right ought to be paid again, but setteth a generall rule which is good and necessary to all the people, that every man may wel keep, without it be through his own default. And if such default happen in any person, whereby he is without remedy at the common law, yet he may be holpen by a Subpœna, and so hee may in many other cases where conscience serveth for him, that were too long to rehearse now.

Do. But I pray thee shew me under what manner a man may be holpen by conscience. And whether he shall be holpen in the same court, or in another.

St. Because it cannot bee well declared where a man shall be holpen by conscience, and where not, but it be first knowne what conscience is, therefore because it pertaineth to thee most properly, to treate of the nature and quality of conscience, therefore I pray thee that thou wilt make me some brief declaration of the nature and quality of conscience, and then I shall answer to thy question as well as I can.

Do. I will with good will doe as thou saiest, and to the intent that thou maiest the better understand that I shall say of Conscience, I shall first shew thee what Synderesis is, and then what Reason is, and then what Conscience is; and how these three differ among themselves, I shall somewhat touch.

What

What Sinderesis is.

Chap. 13.

Sinderesis is a naturall power of the soule, set in the highest part thereof, moving and stirring it to good, and abhorring evill. And therefore Sinderesis never sinneth nor erreth. And this Sinderesis our Lord put in man to the intent that the order of things should bee observed. For after Saint Dionise, the wisedome of God joyneth the beginning of the second things to the last of the first things: for Angell is of a nature to understand without searching of reason, and to that nature man is joyned to Sinderesis, the which Sinderesis may not wholly be extincted neither in man, ne yet in damned soules. But nevertheless, as to the use and exercise thereof, it may be let for a time, either through the darknesse of ignorance, or for undiscreet delectation, or for the hardnesse of obstinacie. First by the darknesse of ignorance Sinderesis may be let, that it shall not murmure against evill, because he believeth evill to be good, as it is in heretikes, the which, when they dye for the wickednesse of their errour, believe that they dye for the very truth of the faith. And by undiscreet delectation, Sinderesis is sometime so overlaid, that remorse or grudge of conscience for that time can have no place. For the hardnes of obstinacy Sinderesis is also let that it may not strive to goodnesse, as it is in damned soules that be so obstinate in evill, that

that they may never be inclined to good. And though Sinderesis may be said to that paine extinct in damned soules, yet it may not be said that it is fully extinct to all intents. For they alwey murmure against the evill of the paine that they suffer for sinne, and so it may not be said that it is universally, and to all intents and so all times extinct. And this Sinderesis is the beginning of all things that may bee learned by speculation or studie, and ministreth the generall grounds and principles thereof: and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: Sinderesis saith that every whole thing is more than any one part of the same thing, & that is a sure ground that never faileth, and an example of things that are to be done, or not to be done: as where Sinderesis saith no evill is to be done, but that goodnesse is to be done and followed, and evill to be fled and such other.

And therefore Sinderesis is called by some men, the Law of Reason, for it ministreth the principles of the law of reason, the which be in every man by nature, in that he is a reasonable creature.

Of Reason.

Chap. 14.

When the first man Adam was created, he received of God a double eye, that is

is to say, an outward eye, whereby he might see visible things, and know his bodily enemies and eschew them. And an inward eye that is the eye of reason, whereby hee might see his spirituall enemies that fight against his soule and beware of them. And among all gifts that God gave to man, this gift of reason is the most noblest, for thereby man precelleth all beasts, and is made like to the dignity of Angels, discerning troth from falshood, and evill from good. Wherefore hee goeth farre from the effect that he was made to, when he taketh not heed to the truth, or when he preferreth evill before good.

And therefore, after Doctors, Reason is the power of the soule, that discerneth betweene good and evill, and betweene good and better, comparing the other: the which also beweth vertues, loveth good, and flyeth vices. And reason is called righteous and good, for it is conformable to the will of GOD, and that is the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because she is deceived with an Errour that might be overcome, or else through her pride or slothfulnesse shee enquireth not for knowledge of the truth that ought to bee enquired. Also reason is divided into two parts, that is to say, into the higher part and into the lower part.

The higher part hideth heavenly things and eternall, and reasoneth by heavenly Lawes, or by heavenly reason what is to be done, & what is

s not to be done, and what things God com-
mandeth, and what he prohibiteth. And this
igher part of reason hath no regard to transi-
ory things or temporall things, but that some-
ime as it were by manner of counsel she bin-
deth forth heavenly reasons to order well tem-
porall things. The lower part of reason wor-
eth most to governe well temporall things, &
e groundeth her reasons much upon lawes of
an, & upon reason of man, whereby she con-
ludeth that that is to be done, that is honest &
xpedient to the commonwealth, or not to be
one, that is not expedient to the Common-
ealth. And so that reason whereby I know
od, and such things as pertaine to God, be-
ngeth to the highest part of reason. And the
eason whereby I know creatures, belongeth
the lower part of reason. And though these
wo parts, that is to say, the higher part, & the
wer part, be one in deed & essence, yet they dif-
r by reason of their working, and of their of-
ce, as it is of one selfe eye, that sometime loo-
eth upward, and sometime downeward.

§ Of Conscience.

Chap. 15.

THis word Conscience, which in latine is
called conscientia, is compounded of this
xposition cum, that is to say in English with,
of this noune scientia, that is to say in Eng-
sh, knowledge, & so Conscience is as much to
y, as knowledge of one thing with another
ing: & conscience so taken, is nothing els but

an applying of any science or knowledg to so
particular act of man. And so conscience m
sometime erre, sometime not erre. And of c
science thus taken, doctors make many descr
tions, whereof one doctor saith, that conscie
is the law of our understanding. Another, t
conscience is an habit of the minde discern
betweene good & evill. Another, that conscie
is the judgement of reason, judging on the p
ticular acts of manuall which sayings agree
one effect (that is to say) that conscience is an
tuall applying of any cunning or knowledge
such things as be to be done, whereupon it
loweth, that upon the most perfect knowledge
any law or cunning & of the most perfect & t
true applying of the same to any particular
of man followeth the most perfit, the most p
& the most best conscience. And if there be def
in knowing of the truth of such a law, or in
applying of the same to particular acts, t
therupon followeth an error or default in con
ence, as it may appeare by this example. Sinc
is minstreth a universall principle that n
erreth, (that is to say) that an unlawful thin
not to be done. And then it might be taken
some man that every oath is unlawfull, bec
the Lord saith Mat. 5. Ye shal in no wise swe
& yet he that by reason of the said words will
that it is not lawfull in no case to sweare er
in conscience, for he hath not the perfit kn
ledg & understanding of the truth of the said
gel, nor he reduceth not the saying of scrip
to other scriptures, in which it is granted
In some case an oath may be lawfull, & the c

why conscience may so erre in the said case, & in other like, is because conscience is formed of a certain proposition or question grounded particularly upon universal rules obtained for such things as are to be done. And because a particular proposition is not known to himselfe, but must appeare & be searched by a diligent search of a reason, therefore in searching in the conscience that should be formed thereupon, may happen to be erroz, & thereupon it is said that there is erroz in conscience: which erroz commeth either because he doth not assent to that he ought to assent unto, or else because his reason whereby he doth refer one thing to another, is deceived. For further declaration whereof it is to understand that erroz in conscience commeth of matter of two sorts. First is through ignorance: and that is when man knoweth not what he ought to do, & then he ought to ask counsell of them that he thinks most expert in that science, whereupon his doubt riseth. And if he can have no counsell, then he must wholly commit him to God, & he of his goodnes will so order him, that he shall save him from offence. The second is through negligence, as when a man is negligent to search his own conscience, or to enquire the truth of other. The 3. is through pride, as when he will not believe himself, nor believe them that be better and wiser then he is. The fourth is through singularity, as when a man followeth his own wit, & will not conforme himselfe to other, nor followe the good common wayes of men. The fift is through an inordinate affection to himselfe, whereby hee maketh conscience to follow his desire,

and so he causeth her go out of her right course. The 6. is through pusillanimity, whereby some person dreadeth oft times such things as of reason he ought not to dread. The 7. is through perplexity, & this is when a man beleeveth himself to be so set betwixt two sins, that he thinketh it impossible, but that he shall fall into the one; but a man can never be so perplexed indeed but through an error in conscience, & if he will put away that error, he shall be delivered; therefore I pray thee that thou wilt alwayes have a good conscience, and if thou have so, thou shalt alwayes be merry, & if thine own heart reprove thee not, thou shalt alwayes have inward peace. The gladnes of right wise men is of God & in God, & their joy is alwayes in truth and goodnes. There be many diversities of conscience, but there is none better then that, whereby a man truly knoweth himself. Many men know many great & high running things, & yet know not themselves, and truly he that knoweth not himselfe knoweth nothing well. Also he hath good & cleane conscience, that hath purity and cleannes in his heart, truth in his word, & rightwisenes in his deed. And as a light is set in a lantern that all that is in the house may be seen thereby, so almighty God hath set conscience in the midst of every reasonable soule as a light whereby he may discern & know what he ought to do, & what he ought not to do. Therefore forasmuch as it behooveth thee to be occupied in such things as pertain to the law: It is necessary that thou ever hold a pure & clean conscience, specially in such things as concern resti-

tution.

tution: for the sin is not forgiven but if the thing that is wrongfully taken bee restored. And I counsell thee also that thou love that is good & fly that is evil, & that thou do to another as thou wouldest should be done to thee; & that thou do nothing to other that thou wouldest not should be done to thee: That thou do nothing against truth, that thou live peaceably with thy neighbor, & that thou do Justice to every man as much as in thee is. And also that in every generall rule of the law, thou do observe & keep equity: & if thou doe thus, I trust the light of the lanterne, that is thy conscience, shall never be extincted. St. But I pray thee shew me what is that Equity that thou hast spoken of before, & that thou wouldest that I should keep. Do. I will with good will shew thee somewhat therof.

§ What is Equity.

Chap. 16.

EQuity is a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetnesse of mercie. And such an equity must alwayes be observed in every law of man, & in every general rule thereof: & that knew he well, that said thus, Laws covet to be ruled by equitie. And the wise man saith, Be not overmuch right wise: for the extreme right wiseness is extreme wrong, as who saith, if thou take all that the words of the law giveth thee, thou shalt sometime do against the law: & for the plainer declaration what equity is, thou shalt understand,

that ſith the deeds & acts of men, for which lawes be ordained, happen in divers manners infinitely. It is not poſſible to make any generall rule of the law, but that it ſhall faile in ſome caſe, and therfore makers of laws take heed to ſuch things as may often come, and not to every particular caſe, for they could not though they would. And therfore to follow the words of the law were in ſome caſe both againſt juſtice and the common wealth. Wherefore in ſome caſes it is neceſſary to leave the words of the law, and to follow the reaſon & juſtice requireth, & to that intent equity is ordained: that is to ſay, to temper & mitigate the rigor of the law. And it is called alſo by ſome men Epicaia, the which is no other thing but an exception of the law of God or of the law of reaſon from the generall rules of the law of man, when they by reaſon of their generalty would in any particular caſe judge againſt the law of God, or the law of reaſon, the which exception is ſecretly underſtood in every generall rule of every poſitive law. And ſo it appeareth that equity taketh not away the very right, but only that that ſeemeth to be right by the generall words of the law: not it is not ordained againſt the equitie of the law, for the law in ſuch caſe generally taken is good in himſelf, but equity followeth the law in all particular caſes where right & juſtice requireth, notwithſtanding the generall rule of the law be to the contrary: wherefore it appeareth that if any lawes were made by a man without any ſuch exception expreſſed or implied, it were manifeſtly unreaſonable & were not to be ſuffered: for ſuch cauſe

might

might come that he that would obserue the law should breake both the law of God, and the law of reason. As if a man make a vow that he will neuer eat whitemeat, & after it happeneth him to come there where he can get no other meat. In this case it behoueth him to breake his avow, for the particular case is excepted secretly from his generall avow by his equity or Epicay, as it is said before. Also if a law were made in a citie, that no man under the paine of death should open the gates of the citie before the Sunne rising: yet if the citizens before that houre flying from their enemies come to the gates of the citie, & one for saving of the citizens openeth the gates before the houre appointed by the law, yet he offendeth not the law, for that case is excepted from the said generall law by equity, as is said before: & so it appeareth that equity rather followeth the intent of the law, then the words of the law. And I suppose that there be in likewise some like equities grounded on the generall rules of the law of the realm. S. Verily, wherof one is this, there is a generall prohibition in the lawes of England, that it shall not be lawfull to any man to enter into the freehold of another without authority of the owner or the law: but yet it is excepted from the said prohibition by the law of reason, that if a man driue beasts by the high way, & the beasts happen to escape into the corne of his neighbour, & he to bring out his beasts that they should do no hurt, goeth into the ground, & fetteth out his beasts, there he shall justifie that entry into the ground by the law. Also notwithstanding the Statute

of Ed 3. made the 14 yeere of his raign, where by it is ordained that no man upon pain of imprisonment should give any almes to any valiant begger, that is well able to labour: yet if a man meet with a valiant begger in so cold a weather and so light apparel, that if he have no clothes he shall not be able to come to any town to have succour, but is likely rather to dye by the way, & he therefore giveth him apparell to save his life, he shall be excused by the said statute, by such an exception of the law of reason as I have spoken of. Do. I know well that as thou saist he shall be excepted of the said stat. by conscience, & over that, that he shall have great reward of God for his good deed, but I would wit whether the party shall be so discharged by the common law, by such an exception of the law of reason, or not: for though ignorance unvincible of a statute excuse the party against God, yet (as I have heard) it excuseth not in the lawes of the realme, ne yet Chancery, as some say, although the case bee so that the party to whom the forfeiture is given may not with conscience leave it. St. Verily, by thy questions thou hast put me in a great doubt, wherefore I pray thee give me a respite therin to make thee an answer, but as I suppose for the time (howbeit I will not fully affirme it to be as I say) it should seeme that he should well plead it for his discharge at the common Law, because it shall be taken that it was the intent of the makers of the statute to except such cases. And the Judges may many times judge after the mind of the makers as farre as the letter may suffer

as

and so it seemeth they may in this case. And divers other exceptions there be also from other generall grounds of the Law of the realme by such equity, as thou hast remembred before, that were too long to rehearse now. Do. But yet I pray thee shew me shortly somewhat more of thy mind under what manner a man may be holpen in this realme by such equity. St. I will with good will shew thee somewhat therein.

§ In what manner a man shall be holpen by equity in the lawes of England.

Chap. 17.

FIrst it is to be understood, there be in many cases divers exceptions from the generall grounds of the law of the Realme by other reasonable grounds of the same law, whereby a man shall be holpen in the common Law. As it is of this general ground, that it is not lawfull for any man to enter upon a Descent, yet the reasonableness of the Law excepteth from the ground, an infant that hath right, and hath suffered such a Descent, & him also that maketh continuall claime, and suffereth them to enter, notwithstanding the descent. And of that exception they shall have advantage in the common law. And so it is likewise of divers statutes, as of the statute whereby it is prohibited, that certain particular tenants shal do no waste, yet if a lease for term of yeers be made to an infant that is within yeers of discretion, as of the age of v. or vj. yeeres, & a stranger do waste, in this case this

infant shall not be punished for the waſt, for he is excepted & excused by the law of reason. And a woman covert to whom such a leaſe is made after the coverture, shal be also discharged of waſt after her husbands death, by a reasonable maxime & custom of the realm. And also for reparations to be made upon the same ground it is lawfull for such particular tenants to cut downe trees upon the same ground to make reparations. But the cause there as I suppose is, for that the minde of the makers of the said statute, shalbe taken to be, that that case should be excepted. And in all these cases the parties shalbe holpen in the same court, & by the common law: & thus it appeareth that sometime a man may be excepted from the rigor of a maxime of the law by another maxime of the Law. And sometime from the rigor of a statute by the law of reason, and sometime by the intent of the makers of the stat. but yet it is to be understood that most commonly, where any thing is excepted from the generall customes or Maximes of the lawes of the Realme by the law of reason, the party must have his remedy by a writt that is called Subpœna, if a Subpœna lye in the case. But where a Subpœna lyeth, and where not, it is not our intent to treat of at this time. And in some case there is no remedy for such an equity by way of compulsion, but all remedy therein must be committed to the conscience of the party.

Do. But in case where a Subpœna lyeth, to whom shall it be directed, whether to the Judge or the party? St. It shall never be directed to the Judge, but to the party plaintiffe or to his Attorney

turney, and thereupon an Injunction commanding them by the same under a certaine paine therein to be contained, that he proceed no further at the common Law, till it be determined in the Kings Chancery, whether the plaintiffe hath title in conscience to recover, or not. And when the plaintiffe by reason of such an Injunction ceaseth to aske any further processe, the Judges will in likewise cease to make any further processe in that behalfe.

Do. Is there any mention made in the law of England of any such equities? Stu. Of this terme Equitie, to the intent that is spoken of here, there is no mention made in the Law of England, but of an equity derived upon certain statutes, mention is made many times and often in the Law of England: But that equity is all of another effect then this. But of the effect of this Equity that wee now speake of, mention is made many times: for it is oftimes argued in the Law of England, where a Subpœna lyeth, and where not, and daily Bils bee made by men learned in the Law of this Realme, to have Subpœna's. And it is not prohibited by the Law, but that they may well doe it, so that they make them not, but in case where they ought to be made, and not for vexation of the party, but according to the truth of the matter. And the Law will in many cases that there shall be such remedy in the Chancery upon divers things grounded upon such Equities, and then the Lord Chancellour must order his conscience after the rules and grounds of the Law of the realme,

insomuch that it had not been inconvenient to have assigned such remedy in the Chancery upon such equities for the seventh ground of the Law of England: but forasmuch as no record remaineth in the Kings Court of no such Bill, ne of the writ of Subpœna or Injunction, that is sued thereupon, therefore it is not set as for a speciall ground of the law, but as a thing that is suffered by the law. D. Then sith the parties ought of right in many cases to be holpen in the Chancery upon such equities: it seemeth that if it were ordained by statute, that there should be no remedy upon such equities in the Chancery, nor in none other place, but that every matter should be ordered onely by the rules and grounds of the common Law, that the Statute were against right and conscience. St. I think the same, but I suppose there is no such statute. Do. There is a statute of that effect, as I have heard say, wherein I would gladly heare thy opinion. Stu. Shew me that statute and I shall with good will say as mee thinketh therein.

§ Whether the Statute hereafter rehearsed by the Doctor, be against conscience, or not.

Chap. 18.

There is a Stat. made in the 4. yeere of K. H. 4. c. 22. whereby it is enacted that judgment given by the Kings Courts, shall not be examined in the Chancery, Parliament, nor

nor elſwhere, by which Statute it appeareth that if any Judgement be given in the Kings courts againſt an equity or againſt any matter of conſcience, that there can be had no remedy by that equity, for the judgement cannot be reformed without examination, and the examination is by the ſaid ſtatute prohibited, wherefore it ſeemeth that the ſaid ſtatute is againſt conſcience: what is thine opinion therein?

St. If judgment given in the Kings Courts ſhould be examined in the Chancery before the Kings Counſell, or any other place, the plaintiffes or demandants ſhould ſeldome come to the effect of their ſuit, ne the law ſhould never have end. And therefore to eſchew that inconvenience that ſtatute was made. And though peradventure by reaſon of that Stat. ſome ſingular perſon may happen to have loſſe, nevertheleſſe the ſaid Statute is very neceſſary, to eſchew many great vexations and unjuſt expences, that would elſe come to many plaintiffes that have right wiſely recovered in the Kings Courts. And it is much more provided for in the law of England that hurt nor damages ſhould not come to many, then only to one. And alſo the ſaid ſtat. doth not prohibit equity, but it prohibiteth onely the examination of the judgement for the eſchewing of the inconvenience before rehearſed. And it ſeemeth that the ſaid ſtatute ſtandeth with good conſcience: for in many other caſes where a man doth wrong yet he ſhall not be compelled by way of compulſion to reforme it, for many times it muſt be left to the conſcience of the party, whether he will re-

dreſſe

dresse it or not. And in such case he is in conscience aswel bound to redresse it if he will save his soule, as he were if he were compellable thereto by the law, as it may appeare in divers cases that may be put upon the same ground. Doct. I pray thee put some of these cases for an example. Stu. If the defendant wage his law in an action of debt brought upon a true debt, the plaintif hath no means to come to his debt by way of compulsion, neither by Subpœna, nor otherwise, & yet the defendant is bound in conscience to pay him. Also if the grand Jury in attaint affirme a false verdict given by the petty Jury, there is no further remedy but the Conscience of the party. Also where there can be had no sufficient proofe, there can be no remedy in the Chancery, no more then there may be in the spirituall Court. And because thou hast given an occasion to speake of conscience, I would gladly heare thy opinion where conscience shall be ruled after the law, & where the law shal be ruled after conscience. D. And of that matter I would likewise gladly heare thy opinion, specially in cases grounded upon the lawes of England, for I have not heard but little thereof in time past: but before thou put any case thereof, I would that thou wouldest shew me how these two questions after thy opinion are to be understood.

Of what Law this question is to be understood: that is to say, where conscience shall be ruled after the Law.

Chap. 19.

The

The law whereof mention is made in this question, that is to say, where conscience shal be ruled by the law, is not as me seemeth to be understood only of the law of reason & of the law of God, but also of the law of man that is not contrary to the law of reason, nor the law of God, but that it is superadded unto them for the better ordering of the commonwealth: for such a law of man is alwaies to be set as a rule in conscience, so that it is not lawfull for a man to farme it on the one side, ne on the other, for such a law of man hath not only the strength of mans law, but also the law of Reason, or of the Law of God, whereof it is derived: for Laws made by man, which have received of God power to make Laws, be made by God. And therefore conscience must be ordred by the law as it must be upon the law of God, & upon the law of reason. And furthermore the Law whereof mention is made in the latter end of the Chapter next before, that is to say, in the question wherein it is asked where the law is to be left & forsaken for conscience, is not to be understood of the law of reason, nor of the law of God: for the two lawes may not be left, nor it is not to be understood of the law of man, that is made in particular cases, & that is consonant to the law of reason, & to the law of God, & that yet that law should be left for conscience: for of such a law made by man, conscience must be ruled, as it is said before: nor it is not to be understood of a law made by man commanding or prohibiting any thing to be done that is against the law of reason, or the

law

law of God. For if any law made by him, binde any person to any thing that is against the said laws, it is no law, but a corruption & manifest errour. Therefore after them that be learned in the laws of England, the said question, that is to say, where the law is to be left for conscience and where not, it is to be understood in divers manners, and after divers rules, as hereafter shall somewhat be touched.

First, many unlearned persons beleeve that it is lawfull for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the Law, though the law doth not warrant them to do that they do, but onely when it is done, doth not for some reasonable consideration punish him that doth it, but leaveth it onely to his conscience. And therefore many persons do oft times that they should not do, and keep as their owne that that in conscience they ought to restore. wherefore there is the laws of England in this case.

If two men have a wood joyntly, & the one of them felleth the wood, and keepeth all the mony wholly to himselfe: In this case his fellow shall have no remedy against him by law, for as they when they tooke the wood joyntly, put each other in trust, and were content to occupy together: so the law suffereth them to order the profits thereof according to the trust that each of them put the other in. And yet if one tooke all the profits, he is bound in conscience to restore the halfe to his fellow, for, as the Law giveth him right only to halfe the land, so it giveth him right onely in con-

science

ſcience to the halfe profits. And yet neverthe-
leſſe it cannot be ſaid in that caſe, that the law
is againſt conſcience, for the law neither will-
eth ne commandeth that one ſhould take all the
profits, but leaveth it to their conſcience: ſo
that no default can be found in the law, but in
him that taketh all the profits to himſelfe may
be aſſigned default, which is bound in conſci-
ence to reform it, if he will ſave his ſoule, though
he cannot be compelled thereto by the law. And
therefore in this caſe & other like, that opinion
which ſome have, that they may do with conſci-
ence, all that they ſhall not be puniſhed for by
the law if they doe it, it is to be left for conſci-
ence: but the Law is not to be left for conſci-
ence.

Alſo many men think that if a man have land
that another hath title to, if he that hath the
right ſhal not by the action that is given him by
the law to recover his right by, recover dama-
ges, that then he that hath the land is alſo diſ-
charged of damages in conſcience, & that is a
great error in conſcience: for though he cannot
be compelled to yeeld the damages by no mans
law, yet he is compelled thereto by the law of
reaſon, & by the law of God, whereby we be
bound to do as we would be done to, & that we
ſhould not covet our neighbours goods: & there-
fore if tenant in tayle be diſſeiſed and the diſſei-
for dyeth ſeiſed, and then the heire in the tayle
ſingeth a Formedon & recovereth the land & no
damages, for the law giveth him no damage in
that caſe, yet the tenant by conſcience is bound
to yeeld damages to the heire in tayle from the

death of his ancestor. Also it is taken by some men, that the law must be left for conscience, where the law doth not suffer a man to deny that he hath before affirmed in Court of Record, or for that he hath wilfully excluded himself thereof for some other cause: as if the daughter that is only heire to her father, will sue liberty with her sister that is a bastard, in that case she shall not after be received to say, that her sister is a bastard, in so much that if her sister take halfe the land with her, there is no remedy against her by the law. And no more there is of diversity in other estoples, which were too long to rehearse now. And yet the party that may take advantage by such an estoppel by the law is bound in conscience to forsake that advantage, specially if he were so estopped by ignorance, & not by his own knowledge & assent. For though the law in such cases giveth no remedy to him that is estopped, yet the law judgeth not that the other hath right unto the thing that is in variance betwixt them. And it is to be understood that the law is to be left for conscience where a thing is tryed and found by verdict against the truth, for in the common law the judgment must be given according as it is pleaded & tried, like as it is in other laws, that the judgment must be given according to that that is pleaded and proved. And it is to be understood that the law is to be left for conscience, when the cause of the Law doth cease, for when the cause of the law doth cease, the law also doth cease in conscience, as appeareth by this case hereafter following.

A man maketh a lease for term of life, & after a stranger doth waste, wherefore the lessee bringeth an action of Trespasse, and hath iudgment to recouer damages, having regard to the treble damages that he shall yeeld to him in the reuersion. And after he in the reuersion before action of waste sued, dieth, so that the action of waste is thereby extincted: then the tenant for terme of life (though he may sue execution of the said iudgement by the law) yet he may not doe it by conscience, for in conscience hee may take no more then he is hurted by the said trespas, because he is not charged ouer with treble dammages to his lessor. Also it is to be vnderstood where a law is grounded vpon a presumption, if the presumption be untrue, then the law is not to be holden in conscience. And now I haue shewed thee somewhat of the question, that is to say, where the law shall be ruled after conscience, I pray thee shew me whether there be not like diuersities in other lawes, betwixt law & conscience. D. Yes verily, very many, whereof thou hast recited one before, where a thing that is untrue is pleaded, and proued, in which case iudgement must be giuen according, as well in the law Ciuill, as in law Canon. And another case is, that if the heire make not his Inuentory, he shall be bound after the law Ciuill to all the debts, though the goods amount not to so much: And the law Canon is not against that law, and yet in conscience the heire which in the Lawes of England is called an Executor, is not in that case charged to the debts, but according to the value of the goods.

And now I pray thee shew mee some cases where conscience shall be ruled after the Law. S. I will with good will shew thee somewhat as me thinketh therein.

§ Here follow divers cases, where conscience is to be ordered after the Law.

Chap. 20.

THe eldest sonne shall have & enjoy his fathers lands at the common law in conscience, as he shal in the Law. And in Burghenglish the younger sonne shall enjoy the inheritance, & that in conscience. And in Gavelkind all the sonnes shall inherit the land together as daughters, at the common law, & that in conscience. And there can be no other cause assigned why conscience in the first case is with the eldest brother, & in the second with the younger brother, & in the 3d. case with all the brethren, but because the law of England by reason of divers customs doth sometime give the land wholly to the eldest sonne, sometime to the yongest, & sometime to all. Also if a man of his meere motion make a feoffment of two acres of land lying in two severall shires, & maketh livery of seisin in the one acre in the name of both: In this case the feoffee hath right but only in the acre whereof livery of seisin was made, because he hath no title by the Law: but if both acres had been in one shire he had had good right to both. And in these cases the diversity of the law maketh the diversity of conscience.

Also

Also, if a man of his meer motion make a feoffment of a Manor, & saith not, to have & to hold &c. with the appurtenances; in that case the feoffee hath right to the demesne lands, and to the rents, if there be attournements, & to the common pertaining to the Manor; but he hath neither right to the advowsons appendant, if any be, nor to the villeines regardant: but if this term, with the appurtenances, had bin in the deed, the feoffee had right in conscience aswell to the advowsons and villeines, as to the residue of the Manor: but if the King of his meer motion give a Manor with the appurtenances, yet the donee hath neither right in law nor conscience to the advowsons nor villeines. And the diversitie of the Law in these cases make the diversitie of conscience.

Also, if a man make a lease for terme of yeers reserving to him and to his heirs a certain rent, upon condition, that if the rent be behind by xl. days &c. that then it shall be lawful to the lessor & his heirs to reenter. And after the rent is behind, the lessor asketh the rent according to the law, & it is not payed, the lessor dyeth, his heire entreth. In this case his entry is lawfull both in law and conscience: but if the lessor had dyed before he had demanded the rent, and his heyrs demanded the rent, & because it is not payed he reentreth, in that case his reentry is not lawfull neyther in law nor conscience.

Also if the tenant in dower sow her land & die before the corne is ripe, the corne in conscience belongeth to her executors, & not to him in the reversion: but otherwise it is in conscience of

graſſe and fruits. And the diuerſity of the law maketh there alſo the diuerſity in conſcience.

Alſo, if a man ſeiſed of lands in his demeſne as of fee, bequeath the ſame by his laſt will to another, & to his heires, & dieth: In this caſe the heire notwithſtanding the will, hath right in the land in conſcience. And the reaſon is becauſe the law iudgeth that will to be void, & as it is void in the law, ſo it is void in conſcience.

Alſo, if a man grant a rent for terme of life, or make a leaſe of land to the ſame grantee for term of life, & the tenant alieneth both in fee. In this caſe he in the reuerſion hath good title to the land both in law and conſcience, & not to the rent. And the reaſon is, becauſe the land by the Alienation is forfeit by the law to him in the reuerſion, and not the rent.

Alſo, if lands be given to two men and to a woman in fee, & after one of the men entermarrieth with the woman, and alieneth the land & dyeth: In this caſe the woman hath right but onely to the third part, but if the man & the woman had been married together, before the feoffement, then the woman notwithſtanding the alienation of her husband, ſhould have right in the law & conſcience to the one halfe of the land. And ſo in theſe two caſes conſcience both followe the Law of the Realme. Alſo if a man haue two ſonnes, one before eſpouſels, & the other after eſpouſels, and after the father dieth ſeiſed of certain lands: In this caſe the yonger ſonne ſhall enioy the lands in this Realme, as heire to his father both in law and conſcience. And the cauſe is, becauſe that ſon borne after eſpou-

espoulels, is by the law of this realme the ve-
ry heire, and the elder son is a bastard. And of
these cases and many other like in the lawes of
England may be formed the Silogisme of con-
science or the true judgement of conscience in
this manner. Sindereſis minustreth the Major
thus: Right wisenes is to be done to every man:
upon which Major the Law of England mi-
nistreth the Minor thus: The inheritance be-
longeth to the son born after espoulels, and not
the son born before espoulels: then conscience
maketh the Conclusion, & saith, therefore the in-
heritance is in conscience to be given to the son
born after espoulels. And so in other cases in-
finite may be formed by the law of the Silogisme
or the right judgement of conscience: wherefore
they that be learned in the law of the realm, say
that in every case, where any law is ordained
for the disposition of lands & goods, which is not
against the law of God, nor yet against the law
of reason, that the law bindeth all them that be
under the law of the court of conscience, that
is to say, inwardly in his soule. And therefore
it is somewhat to marvaile that spirituall men
have not endeavored themselves in time past to
have more knowledge of the Kinges lawes then
they have done, or that they yet doe: for by the
ignorance thereof they be oft times ignorant of
that that should order them according to right
and justice, as well concerning themselves as
other that come to them for Counsell. And
now for as much as I have answered to
thy questions as well as I can: I pray thee
that thou wilt shew me thy opinion in divers

cases formed upon the law of England, wherein I am in doubt, what is to be holden therein in conscience. Do. Shew me thy questions, & I will say as me thinketh therein.

§ The first question of the Student.

Chap. 21.

IF any infant that is of the age of xx yeers, hath reason & wisedome to governe himself, selleth his land, & with the money thereof buyeth other land of greater value then the first was, and taketh the profits thereof, whether may the infant aske his first land again in conscience, as he may by the law? D. What thinkest thou in that question? S. Me seemeth that forasmuch as the law of England in this article is grounded upon a presumption, that is to say that infants commonly afore they be of the age of xxi. yeares be not able to govern themselves, that yet for as much as that presumption faileth in this infant, that he may not in this case with conscience aske the land againe that he hath sold to his great advantage, as before appeareth. D. Is not this sale of the infant & the feoffment made thereupon, if any were, voidable in the law? S. Yes verily. Do. And if the feoffee have no right by the bargaine, nor by the feoffement made thereupon, whereby should he then have right thereto as thou thinkest? S. In conscience, as me thinketh, for the reason that I have made before. D. And upon what law should that conscience be grounded, that the

spee-

speakest of? for it cannot be granted by the law of the Realme, as thou hast said thy selfe. And me thinketh that it cannot be grounded upon the Law of God, nor upon the Law of reason, for feoffements nor contracts be not grounded upon neyther of those lawes, but upon the law of man. St. After the law of propertie was ordained, the people might not conveniently live together without contracts, & therefore it seemeth that contracts be grounded upon the law of reason, or at the least, upon the law that is called Jus gentium. Do. Though contracts be grounded upon the Law that is called Jus gentium, because they be so necessarie & so generall among all people, yet that proveth not that contracts be grounded upon the Law of reason: for though the law called Jus gentium be much necessarie for the people, yet it may be changed. And therefore if it were ordained by statute that there should be no sale of land ne no contract of goods, and if any were, that it should be void, so that every man should continue still seised of his lands and possessed of his goods, the statute were good. And then if a man against that statute sold his land for a summe of money, yet the seller might lawfully retaine his Land according to the statute. And then he were bound to no more but to repay the money that he received with reasonable expences in that behalfe. And so in like wise me thinketh that in this case the infant may with good conscience reenter into his first land: because the contract after the Maximes of the law of the Realme is voyd, for as I have heard, the

Maximes

Maxims of the law be of as great strength in the Law as statutes. And some thinke that in this case the Infant is bound to no more, but only to repay the money to him that he sold his land unto, with such reasonable costs and charges as he hath sustained by reason of the same. But if a man sel his land by a sufficient & lawfull contract, though there lacke livery of seisin or such other solemnities of the Law, yet the seller is bound in conscience to performe the contract. But in this case the contract is insufficient, and so me thinketh great diversitie betwixt the cases. Stu. For this time I hold me contented with thy opinion.

§ The second question of the Student.

Cap. 22.

IF a man that hath lands for terme of life, be impanelled upon an Inquest, & thereupon leeseth issues & dieth, whether may those issues be levied upon him in the reversion in conscience as they may be by the law? D. If they may be levied by the law, what is the cause why thou doest doubt whether they may be levied by conscience? S. For there is a Maxime in the lawes of England, that where two Titles run together, the eldest Title shall be preferred. And in this case the title of him in the reversion, is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may be lawfully levied. Do. By that reason it seemeth that we are in doubt what the law is in this

case,

case, but that must necessarily be knowne, for else it were in vaine to argue what conscience will therein. S. It is certain that the law is such, & so it is likewise if the husband forfeit issues, and die, those issues shall be levied on the lands of the wife. D. And if the law be such, it seemeth that conscience is so in likewise, for sith it is the law, that for execution of justice every man shall be impanelled when need requireth, it seemeth reasonable, that if he will not appeare, that he should have some punishment for his not appearance, for else the law should be clearly frustrate in that point. And the paine, as I have heard, is, that he shall loose issues to the King for his not appearance: wherefore it seemeth not inconvenient nor against conscience, though the law be, that those issues shall be levied of him in the reversion, for that the condition was secretly understood in the law, to passe with the lease when the lease was made. And therefore it is for the lessor to beware & to prevent the danger at the making of the lease, or else it shall be adjudged his owne default. And then this particular Maxime whereby such issues shall be levied upon him in the reversion, is a particular exception in the Law of England from the generall Maxime that thou hast remembred before, that is to say, that where two titles run together, that the eldest title shall be preferred, & so in this case the generall Maxime in this point shall hold no place, neither in law, nor in conscience, for by this particular maxime the strength of the generall maxime is restrained to every intent, that is to say, aswell in law as in conscience.

The

§ The third question of the Student.

Chap. 23.

If a Tenant for terme of life, or for term of yeers, do waſt, whereby they be bound by the iaſwes to yeeld to him in the reverſion treble damages, & ſo ſhall for the place waſted, whether is he alſo bound in conſcience to pay thoſe damages, & to reſtore that place waſted immediately after the waſt done, as he is in the ſingle damages, or that he is not bound thereto till the treble damages, and place waſted be recovered in the kings Court? Do. Before judgment given in the treble damages & of the place waſted, he is not bound in conſcience to pay them, for it is uncertain what he ſhould pay: But it ſufficeth that he be ready till judgement be given to yeeld damages according to the value of the waſt, but after the judgement given, he is bound in conſcience to yeeld the treble damages, & alſo the place waſted. And the ſame law is in all ſtatutes Penall, that is to ſay, that no man is bound in conſcience to pay the penalty till it be recovered by the law. St. whether may he that hath offended againſt ſuch a ſtatute penall defend the action and hinder the judgement, to the intent he would not pay the penalty, but onely ſingle damages? Do. If the action be taken right wiſely according to the Statute, and upon a juſt cauſe, the defendant may in no wiſe defend the action, unleſſe he have a true dilatory matter to plead, which ſhould bee hurtfull to him if he pleaded not, though he be

not

not bound to pay the penalty till it bee recovered.

§ The fourth question of the Student.

Chap. 24.

IF a man enfeoffe other in certain land upon condition, that if he enfeoffe any other, that it shalbe lawfull for the feoffor & his heires to reenter, &c. whether is this condition good in conscience, though it be void in the law? D. What is the cause why this condition is void in the law? St. The cause is this, by the law it is incident to every state of fee simple, that he that hath the estate, may lawfully by the law, and by the gift of the feoffor, make a feoffement thereof: And then when the feoffor restraineth him after that he shall make no feoffement to no man against his owne former grant, and also against the purity of the state of a fee simple, the Law judgeth the condition to be void, but if the condition had been, that he should not have infeoffed such a man, or such a man, that condition had bin good, for yet he might infeoffe other.

D. Though the said condition be against the effect of the state of a fee simple, and also against the law: nevertheless it is not against the intent that the parties agreed upon, & that at the time of the livery. And forasmuch as the intent of the parties was that if the feoffee infeoffed any man of the land, that the feoffor should enter, & to that intent the feoffee took the state &

after

after breake the intent, it seemeth that the law in conscience should returne to the feoffor. The intent of the parties in the Lawes of England is void in many cases; that is to say, if he be not ordred according to the law. And if a man of his meere motion without any recompence entending to give lands to another and to his heires make a deed unto him, whereby he giveth him those lands, to have & to hold to him for ever intending that by the word (for ever) the feoffee should have the land to him and to his heires, in this case his intent is void, and the other shall have the land onely for terme of life. Also if a man give lands to another, & to his heires for terme of xx. yeares, intending, that if the feoffee die within the term, that then his heires should enjoy the land during the terme: In this case his intent is void, for by the law of the Realme all chattels real & personal shal go to the executors, & not to the heire. Also, if a man give lands to a man and to his wife, & to the third person intending that every of them should take the third part of the land as three common persons should, his intent is void, for the husband and the wife, as one person in the law, shall take only the one half, & the third person the other half: but these cases be alway to be understood where the said estates be made without any recompence. And forasmuch as in this præmisses the intent of the feoffor is grounded against the law, and that there is no recompence appointed for the feoffement, mee thinketh that the feoffor hath neither right to the Land by law or conscience: for if hee should have it by

con-

conſcience, that conſcience ſhould be grounded upon the law of reaſon, and that it cannot, for conditions be not grounded upon the Law of reaſon, but upon the maxims & cuſtomes of the realme: & therefore it might be ordeined by ſtatute that all conditions made upon land ſhould be void. And when a condition is void by the Maxims of the Law, it is as fully voide to every intent, as if it were made void by ſtatute, and ſo me thinketh that in this caſe the feoffor hath no right to the land in law nor in conſcience. D. I am content thy opinion ſtand till we ſhall have hereafter a better leiſure to ſpeake farther in this matter.

§ The fift queſtion of the Student.

Chap. 25.

IF a fine with proclamation be levied according to the ſtatute, and no claim made within v. yeers, &c. whether is the right of a ſtranger extinct thereby in conſcience, as it is in the law? Do. Upon what conſideration was that ſtat. made? St. That the right of lands & tenements might be the more certainly knowen, and not to be ſo uncertain as they were before that ſtatute. D. And when any law of man is made for a Common wealth, or for a good peace and quietneſſe of the people, or for any inconvenience or hurt to be ſaved from them, that law is good, though per caſe it extinct the right of a ſtranger, and muſt be kept in the Court of

Con-

Conſcience: for as it is ſaid before in Ch. 4. By lawes right wiſely made by man, it appeareth who hath right to the lands & goods, for whatſoever a man hath by ſuch a Law hee hath it right wiſely. And whatſoever he holdeth againſt ſuch a law he holdeth unright wiſely: and further more it is ſaid there, all the lawes made by man which be not contrary to the Law of God, muſt be obſerved and kept, & that in conſcience. And he that deſpiſeth them deſpiſeth God, & he that reſiſteth them, reſiſteth God. Alſo it is to be underſtood, that poſſeſſions & the right thereof is ſubject to the lawes, ſo that they therefore with a cauſe reaſonable may be tranſlated and altered from one man to another, by the act of the Law. And of this conſideration that Law is grounded, that by a contract made in faires and markets, the propertie is altered except the propertie be to the King, ſo that the buyer pay toll, or do ſuch other things as is accuſtomed there to be done upon ſuch contracts, and that the buyer knoweth not the former property. And in the law Civill there is a like Law, that if a man have another mans goods with a title three yeares, thinking that he hath right to it, he hath the very right unto the thing, and that was made for a law, to the intent that the property and right of things ſhould not be uncertaine, and that variance and ſtrife ſhould not be among the people. And forasmuch as the ſaid Statute was ordained to give a certainty of title in the Lands and Tenements compriſed by the fine: It ſeemeth that that fine extingueth the title of all other, aſwell in

conſcience as it doth in the Law. And ſith I have anſwered to thy queſtion, I pray thee let me know thy minde in one queſtion concerning tailed lands, and then I will trouble thee no further at this time.

A queſtion made by the Doctor, how certaine recoveries that be uſed in the Kings Courts to defeat tailed land, may ſtand with conſcience.

Chap. 26.

I Have heard ſay, that when a man that is ſeiſed of lands in the taile, ſelleth the land, that it is commonly uſed, that he that buyeth the land, ſhall for his ſurety, and for the avoyding of the Taile in that behalfe, cauſe ſome of his friends to recover the ſaid lands againſt the ſaid tenant in taile: which recovery, as I have ſeene credibly enformed, ſhalbe had in this manner: the demandants ſhall ſuppoſe in their writ & declaration, that the tenant hath no entry, but by ſuch a ſtranger as the buyer ſhall him name and appoint, where indeed the demandants never had poſſeſſion thereof, nor yet the ſaid ſtranger. And thereupon the ſaid tenant in taile ſhall appeare in the court, and by aſſent of the parties, ſhall vouch to warrant one that knoweth wel hath nothing to yeeld in value. And the vouchee ſhal appeare, & the demandants ſhall declare againſt him, and thereupon he ſhall take a day to imparle at the ſame terme, and at that day by aſſent and conſent of the parties he

shall make default, upon which default ber
it is a default indespite of the Court, the
mandants shall have judgement to recover
gainst the tenant in taile, and he over in va
against the vouchee, and this judgement and
covery in value, is taken for a bar of the t
for ever: how may it therefore be taken, that
law standeth with conscience, that as it frem
alloweth and favoureth such fained recoveri
St. If the tenant in taile sell the land for a c
taine sum of money as is agreed betwixt the
at such a price as is commonly used of ot
lands, and for the surety of the sale suffer
such a recovery as is aforesaid, what is
cause that moveth thee to doubt whether
said contract, or the recovery made thereu
for the surety of the buyer that hath truly p
his money for the same, should stand with
science? Do. Two things cause me to do
therein, one is for that, that after our Lord
given the land of Behest to Abraham and to
seed, that is to say, to his children in pos
alway to continue, he said to Moses, as it
peareth Levit. 25. the land shall not be sold
ever, for it is mine. And then our Lord al
ed a certain manner how the land might b
dermed in the yeere of Jubilee if it were
before: and forasmuch as our Lord
that the Land so given to Abraham and
children should not be sold for ever, it fem
that he doth against the ensample of God,
alieneth or selleth the land that is given to
and to his children, as lands intailed be g
Another cause is this: it appeareth by

commandement of God, that thou shalt not covet the house of thy neighbour, &c. And if that concupiscence be prohibited, more stronger then the unlawfull taking and withholding thereof is prohibited: and forasmuch as tailed land, when the ancestor is dead, is a thing that of right is belonging to his heire, for that he is heire according to the gift, how may the land with right or conscience be holden from him?

St. Notwithstanding the prohibition of Almightie God, whereby the land that was given to Abraham & to his seed might not be alienated for ever, yet lands within walled townes might lawfully be alienated for ever, except the lands of the Levites, as appeareth in the said Chapter of Levitic. 25. And so it appeareth that the said prohibition was not generall for every place, and that among the Jewes. And it appeareth also that it was given only to Abraham and his children, and so it was not generally to all people. And it appeareth also, that it extended not but onely to the land of promission; as it appeareth by the words of the said Chapter, where it is said thus, all the region of our possession shall bee sold under the condition of redeeming: whereby appeareth that Lands in other Countries bee not bound to that condition, and as they bee not bound to that condition, by the same reason it followeth, that they be not bound to the same succession. Therefore that said Law, that will that the Land given to Abraham and to his seed shall not bee sold for ever;

bindeth no land out of the land of promission, some men will say, that sithen the passion of our Lord was promulgate and knowen, binden not there. And to the second reason which is grounded upon the commandement of God: It must needs be granted that it is not lawfull to any man unlawfully to covet the house of his neighbour, and that then more stronger he may not unlawfully take it from him: but there remaineth for thee yet to prove how in the case this tailed land that is sold by his ancestor and whereof a recovery is had recorded in the Kings court, may be said the lands of the heir.

D. That may be proved by the laws of the Realme, that is to say, by the statute of Westminster the second, cap. 1. where it is said that The will of the giver expressly contained in the deed of his gift, shall be from henceforth observed, so that they to whom the tenements be so given, shall not have power to alien, but that the lands after their death shall remaine to their issue or returne to the donour, if the issue fail. By the which statute it appeareth evidently that though they to whom the tenements were so given, alienen them away, that yet nevertheless they in law and conscience by reason of the said Statute ought to remaine to the heires according to the gift, for it is holden commonly by al Doctors that the commandements and rules of the law of man or of a positive law that is lawfully made, binde all that be subject to the law according to the minde of the maker and that in the Court of Conscience.

Stu. Doest thou think that if a man offend against a statute Penal that he offendeth in conscience? I admit that he do it not of a wilfull disobedience, or that he will not obey the law: for if he doe it of disobedience, I thinke hee offendeth. D. If it be but onely a Statute that is called Popular it bindeth not in conscience to the payment of the penalty, till it be recovered by the law, and then it doth bind in conscience: but if a statute be made principally to remedy the hurt of one party, and for that hurt it giveth a penalty to the party, in that case the offendour of the Statute is bound immediately to restore the damages to the value of the hurt, as it is upon the stat. of Wast, but the penalty above the hurt he is not bound to pay till judgement be given as it is said before: but statutes by the which it is assigned who shall have right or property to these Lands and Tenements or to these goods or cattels, if it bee not against the law of God, nor against the law of reason, binde all them that bee subject to the law, in law and conscience, and such a statute is the statute of West. 2, whereof we have treated before, wherefore it must be observed in conscience.

St. But some hold that the statute of Westminster the second was made of a singularity and presumption of many that were at the said Parliament, for exalting and magnifying of their owne blood, and therefore they say that that statute made by such a presumption bindeth not in conscience.

D. It is very perilous to judge for certaine

that the said Statute was made of such presumption as thou speakest of: for there be many considerations to prove that the said Statute was not made of such presumption, but rather of a very good minde of all the Parliament, or at the least of the more part thereof, and for the common wealth of all the realme first in the King the which in the said Parliament was the head, and most chiefe and principall part of the Parliament (as he is in every Parliament) cannot be noted to be such intent: for it is not necessary nor it was not then in use, that lands of the Crowne should be entailed: and in spirituall men, ne yet in certain Burgesses and Citizens of the said Parliament which at that time had no land, there can be noted no such singularity: nor yet in the Noblemen and Gentlemen nor such other as were of the said Parliament and had Lands and tenements. It is not good to judge in certaine that they did it of such presumption, but it is good and expedient in this case as it is in other cases that be in doubt, to hold the surer way, and that is, that it was made of charity, to the intent that hee nor the heires of him to whom the land was given should not fall into extreme poverty, and thereby happen to run into offences against God. And though it were true as they say, that it was not made of charity but of presumption and singularity as they speak of: Nevertheless forasmuch as the statute is not against the Law of God nor against the Law of Reason, it must be obeyed by all them that be Subjects unto the

Law

Law. For as Iohn Gerson in the Treatise that he writeth in latine, De vita spirituali animæ, the fourth lesson, and the third corollary, saith, that God will that makers of Lawes judge onely of outward things, and reserve secret things to him. And so it appeareth that man may not judge of the inward intent of the deed, but of such things as bee apparant and certaine, but it is not apparant that there was any such corrupt intent in the makers of the said Statute: how may it therefore be said that the Law is good or right wise, that not onely suffereth such things against the statute, but also against the commandement of God?

St. To that some answer and say, that when the land is sold, and a recovery is had thereupon in the Kings Court of Record, that it sufficeth to barre the tayle in conscience, for they say, that as the tayle was first ordained by the Law, so they say that by the law it is annulled againe. Do. Wee thou thy selfe judge, if in that case there be like authority in the making of the tayle, as there is in the annulling thereof: for it was ordained by authority of Parliament, the which is alway taken for the most high Court in this Realme before any other, and it is annulled by a false supposell, for that, that they that be named demandants should have right to the land, where in truth they had never right thereto: whereupon followeth a false supposell in the writ, and a false supposell in the declaration, and a voucher to warrant by covin of such a person as hath nothing to yeeld in value, and thereupon by covin

gnd collusion of the parties followeth the default of the vouchee, by the which default the judgment shalbe given. And so all the judgment is derived & grounded of the untrue suppose & covin of the parties, whereby the Law of the realm that hath ordained such a writ of Entre to help them that haveright to lands or tenements is defrauded, the Court is deceived, the heire is disherited, & as it is to doubt the buyer and the seller, their heires & assignes having knowledge of the taile, be bound to restitution: and verily I have heard many times, that after the Law of the Realme such recoveries should be no barre to the heire in the taile, if the law of the realme might be therein indifferently heard. S. I cannot see but that after the Law of the realme it is a barre of the taile, for when the tenant in taile hath vouched to warranty, and the vouchee hath appeared and entred into the warranty, & after hath made default in despite of the court, whereupon judgement is given for the demandant against the tenant, & for the tenant that he shall recover in value against the vouchee: if the heire in the taile should after bring his Formedon & recover the lands intailed, and after the vouchee purchaseth lands, then should the heire also have execution against him to the value of the lands entailed, as heire to his ancestor that was tenant in the first action, and so he should have his owne lands, and also the lands recovered in value: & therefore because of the presumption that the vouchee may purchase lands after the judgement some be of opinion that it is in the law a good bar of the taile. D. I suppose

that

that in that case thou hast put, that the voucher may barre the heire in taile of his recoverie in value, because he hath recovered the first lands. Nevertheless I will take a respit to be advised of that recovery in value. And if thou can yet shew me any other consideration why the said recoveries should stand with conscience, I pray thee let me heare thy conceit therein, for the multitude of the said recoveries is so great, that it were great pity that all should be bound to restitution that have lands by such recoveries, sith there is none (as far as I can heare) dispose them to restore. Stu. Some men make another reason to prove that the said recoveries should be sufficient by the law to avoid the statute of West. then and if they bee sufficient thereto they be sufficient in conscience. D. what is their reason therein? S. In the 7. yeere of H. 8. c. 4. among other things it is enacted that all recoverers their heires and assignes, may advow and justifie for rents, services, & customes by them recovered, as they against whom they recovered might have done. And then they say that when the Parliament gave to such recoverers authority to avow and justifie for such rents, customes, and services as they recovered, that the intent of the Parliament was, that such recoverers should have right to that for the which they should avow or justifie: for else they say that it should be in vaine to give them such power, and that the Parliament should else be taken in manner as fortifiers of wrongfull titles, and so they say that such recoverers by reason of the said Statute have

right

right by the law. D. That statute as it seemeth was made onely to give to the recoverers, a forme to avow and justifie which they had not before, though they had recovered upon a good title. And the cause why they had no forme to avow or justifie before the said Statute was, forasmuch as the recoverers did not by the pretence of their action, affirme the possession of him or them against whom they recovered, nor claimed not by them, but rather disaffirmed and destroyed their estate: And therefore they cannot alledge any continuance of their title by them, as they may that have rents, or services, or such other of the grant of other by deed or by fine. And therefore as it seemeth the most principall estate of the statute was, that such recoverers should avow and justifie for rents, services, and customes, as they should or might do that had them by fine, or deed: not having any respect as it seemeth whether they recovered against tenant in fee simple, or in fee tayle, nor whether the recoveries were had upon a rightfull title. And therefore as mee seemeth the said Statute neither affirmeth nor disaffirmeth the title of recoverers, whereby they doe avow: For if a man had right before the recovery, the right should remaine unto him notwithstanding the said Statute, and so mee seemeth that the title of them that have the land entayled by such recoveries, is nothing fortified nor affirmed by the said statute, but that they are in the same case as they were before, what thinkest thou therein? S. This matter is great, for as thou sayest there be so many

that

that have tayled lands by such recoveries, that it were great pitie and heavinesse to condemne so many persons, and to judge that they all were bound to restitution. For I thinke there bee but few in this realme that have lands of any notable value, but that they or their ancestors, or some other by whom they claime, have had part thereof by such recoveries. Insomuch that Lords Spirituall and Temporall, Knights, Squires, rich men and poore, Monasteries, Colledges and Hospitals have such land, for such recoveries have been used of long time: who may thinke therefore without great heavinesse, that so many men should be bound to restitution, and that yet as thou sayest, no man disposeth him to make restitution? And so I am in manner perplexed, and wot not what to say in this case, but that yet I trust that ignorance may excuse many persons in that behalf. Doct. Ignorance of the deed may excuse, but ignorance of the Law excuseth not, but it be invincible, that is to say, that they have done that in them is to know the truth: as to counsell with learned men, and to aske them what the Law is in that behalfe, and if they answer them, that they may doe this or that lawfully, then they be thereby excused in conscience. But yet in mans Law they bee not thereby discharged, but they that have taken upon them to have knowledge of the Law, be not excused by ignorance of the Law, ne no more are they that have a wilfull ignorance, and that would rather bee ignorant then to know the truth. And therefore they will not dispose them to

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aske any Counsell in it, and if it be of a thing that is against the Law of God, or the Law of reason, no man shall be excused of ignorance, and so there be but few that be excused by ignorance. S. What then, shall we condemne so many and so notable men? D. Wee shall not condemne them, but we shall give them their perill. Sr. Yet I trust their danger is not so great that they should be bound to restitution: For John Gerson saith in his said booke called, De unitate Ecclesiastica, consideratione secunda; Quod communis error facit jus: that is to say, A common error maketh a right. Of which words as it seemeth some trust may be had, that though it were fully admitted the said recoveries were first had upon an unlawfull ground and against the good order of conscience, that yet nevertheless, forasmuch as they have beene used of long time, so that they have bin taken of divers men that have beene right well learned, in manner as for a law, that the buyers partly be excused, so that they be not bound to restitution. And moreover, it is certaine that the Statute of Westminster the second, nor none other statute made by man cannot be of greater value or strength, then was the bond of matrimony that was ordained of God. And though that bond of Matrimony was indissolvable, yet nevertheless Moses suffered a bill of refusall of the Jewes, which in Latine is called Libellum repudii, and so they might thereby forsake their wives, as it appeareth Deuteron. 22. and therefore like as a dispensation was suffered against that bond, so it seemeth it may bee a-

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gainſt the ſtatute. D. As to that reaſon that thou haſt laſt made of a bill of refuſall, let all purchaſors of land heare what our Lord ſaith in the Goſpell of the Jewes, of that bill of refuſall, Matthew 19. where he ſaith thus, For the hardneſſe of your hearts Moſes ſuffered you to leave your wives: for at the beginning it was not ſo. Of which words Doctors hold commonly that though ſuch a bill of refuſall was lawfull, ſo that they that refuſed their wives thereby, ſhould be without pain in the law, that yet it was never lawfull ſo that it ſhould bee without ſin. And ſo likewiſe it may be ſaid in this caſe, that ſuch recoveries be ſuffered for the hardneſſe of the hearts of Engliſhmen, which deſire land and poſſeſſion with ſo great greedines that they cannot be withdrawn from it neither by the law of God nor of the realme. And therefore the rich men ſhould not take the poſſeſſions of poore men from them by power, without colour of title, that is to ſay, neither by open Diſſeiſin, or by the onely ſale of the tenant in taile, and ſo to hold them againſt the expreſſe words of the ſtatute, ſuch recoveries have bin ſuffered. And though for their great multitude they may happily be without paine as to the law of the Realme, yet it is to feare that they be not without offence, as againſt God: and as to the other reaſon, that a common error, ſhould make a right, thoſe words as me ſeemeth be to be thus underſtood, that a cuſtome uſed againſt the Law of man ſhall be taken in ſome countries for law, if the people be ſuffered ſo to continue. And yet ſome men call ſuch

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a custom an error, because that the continuance of that custome against the law was partly an error in the people, for that they would not obey the Law that was made by their superiours to the contrary of that Custome: but it is to be understood that the said recoveries, though they have been long used, may not be taken to have the strength of a custome, for many as well learned as unlearned have alwey spoken against them, and yet doe. And furthermore as I have heard say, a custome or a prescription in this Realme against the statutes of the realm prevailes not in the law. 8. Though a custome in this Realme prevaileth not against a Statute as to the Law, yet it seemeth that it may prevaile against the statute in conscience: for, though ignorance of a statute excuseth not in the law, nevertheless it may excuse in conscience, and so it seemeth that it may doe of a custome. Do. But if such recoveries cannot be brought into a lawfull custome in the Law, it seemeth they may not be brought into a Custome in conscience, for conscience must alwey be grounded upon some Law, and in this case it cannot be grounded upon the Law of reason, nor upon the Law of God: and therefore if the Law of man serve not, there is no ground whereupon confreience in this case may be grounded: and at the beginning of such recoveries, they were taken to be good because the Law should warrant them to be good, and not by reason of any Custome; and so if the reason of the Law will not serve in the recoveries, the custome cannot helpe, for an evill Custome

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is to be put away. And therefore me seemeth that the recoveries be not without offence against God, though happily for their great multitude, and that there should not be as it were a subversion of the inheritance of many in this Realme, as well of spirituall or temporall, they be without paine in the Law of the Realme except such recoveries as by the common course of the Law be voidable in the law by reason of some use, or of some other speciall matter: but what paine that is, I will not temerously judge, but commit it to the goodnesse of our Lord, whose judgements bee very deepe and profound, nor I will not fully affirme that they that have lands by such recoveries ought to be compelled to restitution: but this seemeth to me to be good counsell, that every man hereafter hold that is certaine, and leave that is uncertaine, and that is, that he keepe himselfe from such recoveries, and then he shall be free from all scrupulousnesse of conscience in that behalfe.

Sco. It seemeth that in this question thou ponderest greatly the said statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest that it must be holden in conscience: and over that, as it seemeth thou art somewhat in doubt, whether those recoveries be any barre to the heire in the tayle by the law of the Realme, unlesse that he have in value in deed upon the voucher, and that thou wilt thereupon take a respite or thou shew thy

full

full mind therein, and in like wise thou thinkest as I take it, that those recoveries cannot bee brought into a custome, but that the longer that they be suffered to continue if they be not good by the Law, the greater is the offence against God. And therefore thou ponderest little that custome, but yet thou agreest that it is good to spare the multitude of them that be past, lest a subversion of the inheritance of many of this realme might follow, and great strife and variance also, if they should be annulled for the time past, except there be any other speciall cause to avoyd them by the Law, as thou hast touched in the last reason: but thou thinkest that it were good, that from henceforth such recoveries should be clearely prohibited, and not bee suffered to be had in use, as they have been before, and thou counsellest all men therefore to refraine themselves from such recoveries hereafter. Do. Thou takest well that I have said, and according as I have meant it. S. Now I pray thee, sith I have heard thy question of these recoveries, according to thy desire, that thou wouldest answer me to some particular questions concerning Tailed lands, whereof thou hast at this time given us occasion to speake. D. Shew me these questions, & I will shew thee my minde therein with good will.

§ The first question of the Student, concerning tailed lands.

Chap. 27.

It

IF a disseisor make a gift in tail to John a Stile, and J. at S. for the redeeming of the title of the disseisee, agreeth with him that hee shall have a certain rent out of the same land to him & to his heires, & for the surety of the rent it is devised that the disseisie shall release his right in the land &c. and that such a recovery as we have spoken of before, shalbe had against the said J. at St. to the use of the payment of the said rent and of the former taile: whether standeth that recovery well with conscience or not, as thou thinkest? D. I suppose it doth, for it is made for the strength and surety of the taile, which the disseisie might have cleerely defeated and avoided if he would, & therefore I think if the said J. at S. had granted to the disseisie, only by his deed a certain rent for the releasing of his title, that grant should have bound the heires in the taile for ever. And then if the disseisie for his more surety will have such a recovery as before appeareth, it seemeth that recovery standeth with good conscience. S. It seemeth that thy opinion is right good in this matter. And also it appeareth that with a reasonable cause, some particular recoveries may stand both with law and conscience to bar a taile.

§ The second question of the Student, concerning tailed lands.

Cap. 28.

IF a tenant in taile suffer a recovery against him of his lands entailed, to the intent that

the recoverer shall stand seised thereof, to the use of a certain woman whom he intendeth to take to his wife, for terme of life, and after to the use of the first Taile, and after he marrieth the same woman, whether standeth that recoverie with conscience, though other recoveries upon bargains and sales did not? Do. It seemeth yes, for though the Statute bee that they to whom the tenements be so given, should not have power to alien, but that the Lands after their death should remaine to their issues, or revert to the donours, if the issues failed: yet if hee to whom the Lands were so given, take a wife, and dyeth seised without heire of his body, and the donour enter, the woman shall recover against him the third part to hold in the name of her dowry, for terme of her life, though the taile be determined. And the same law is of tenant by the Courtesie, that is to say, of him that happeneth to marry one that is an inheritrix of the Land entailed, and they have issue, the wife dyeth, and the issue dyeth, he shall hold the lands for terme of his life, as tenant by the curtesie, notwithstanding the words of the Statute, which say that after the death of the tenant in taile without issue, the lands shall revert to the donor: and I think the cause is because the intent of the statute shall not be taken, that it intended to put away such titles as the Law should give, by reason of the Taile: and so it seemeth that a like intent of the Statute shalbe taken for Jointures, for els the Statute might be sometime a letting of Matrimonie, and it is not like that the statute intend-

to. And therefore it seemeth, that by the only deed of the tenant in taile, a Jointure may bee made by the intent of the Statute, though the words of the statute serve not expresly for it: for many times the intent or the letter shall be taken, and not the bare letter, as it appeareth in the same Statute, where it is said, that he to whom the lands be given shal have no power to alien: yet the same statute is construed, that neither he nor his heires of his body shall have no power to alien: and so me thinketh that such an intent shall be taken here for saving of Jointures. &c. Truth it is, that sometime the intent of a Statute shalbe taken further then the expresse letter stretcheth, but yet there may no intent bee taken against the expresse words of the Statute, for that should be rather an interpretation of the statute, then an exposition: and it cannot bee reasonably taken, but that the intent of the makers of the said Statute was, that the land should remaine continually in the heires of the taile, as long as the taile moueth: and there can no Jointure bee made neither by deed nor by recovery, but that the taile must thereby be discontinued, and therefore this case of Jointure is not like to the said cases of Tenant in Dower, or Tenant by the Curtesie: for the title of Dowrie, and of Tenancie by the Courtesie groweth most specially by the continuance of the possession in the heires of the Taile, but it is not so of Jointures: and therefore by the only deed of the Tenant in the Taile, there may no Jointures be lawfully made against the expresse words

of the statute. And if there be any made by way of recovery, then it seemeth that it must be put under the same rule, as other recoveries must be of lands entailed.

§ The third question of the Student, concerning tailed lands.

Chap. 29.

IF John at Noke being seised of lands in fee, of his meer motion make a feoffment of certain lands to the intent that the feoffees shall thereof make a gift to the said Jo. at Noke to have to him and to his heires of his body, and they make the gift according; And after the said J. of Noke falleth into debt, wherefore he is taken and put in prison, and thereupon for payment of his debts, hee selleth the same land, and for surety of the buyer he sufferеth a recovery to be had against him in such manner as before appeareth, whether standeth that recovery with conscience or not? D. I would here make a little digression to ask thee another question or that I make answer to thine: that is to say, to feele thy minde how the Law by the which the body of the debtor shall be taken and cast into prison, there to remain til he have paid the debt, may stand with conscience, specially if he have nothing to pay it with, for as it seemeth if he will relinquish his goods which in some lawes is called in latine Cedere bonis, that he shall not be imprisoned, and that is to be understood most specially if hee bee fallen into po-

poverty, and not through his owne default. S. There is no law in the realme that the defendant may in any case Cedere bonis, and as me seemeth if there were such a law, it should not be indifferent, for as to the knowledg of him that the mony is owing to, the debtor might Cedere bonis, that is to say, relinquish his goods, and yet retaine to himselfe secretly great riches. And therefore that Law in such case seemeth more indifferent and righteous that committeth such a debtor to the conscience of the plaintife to whom the money is owing, then the committing him to the conscience of him that is the debtor: for in the debtor some default may be assigned, but in him to whom the money is owing, may be assigned no default. D. But if he to whom the debt is owing, knoweth that the debtor hath nothing to pay the debt with, and that he is fallen into poverty by some casualty, and not through his owne default, doth the law of England hold, that he may with good conscience keepe the debtor still in prison till he be paid? S. May verily, but it thinketh more reasonable to appoint the liberty and the judgement of conscience in that case to the debtee then to the debtor, for the cause before rehearsed; and then the debtor, if hee knew the truth, is (as thou hast said) bound in conscience to let him goe at liberty though he be not compellable thereto by the Law. And therefore admitting it for this time, that the law of England in this point is good and just, I pray thee that thou wilt make answere to my question. Doct. I will with good will, and

therefore as me seemeth, forasmuch as it appeareth that the said gift was made of the meere liberty and freewill of the said John at Noke, and without any recompence: that therefor it cannot be otherwise taken, but that the intent of the said J. at Noke, as well at the time of the said feoffment, as at the time that he received againe the said gift in the taile, was, that if he hapened afterwards to fall into poverty, that he might alien the said Land to relieve him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he will forget himselfe? and so it seemeth that not onely the said recovery standeth with conscience, but also if he had made only a feoffement of the land, the feoffement should be in conscience a good barre of the taile: but if the said feoffement and gift had bin made in consideration of any recompence of money, or for any matrimony or such other, then the feoffment of the said J. at N. should not bind his heire, & if he then suffred any recovery thereof, then the recovery should be of like effect as other recoveries whereof we have treated before, and this which I said it was good to favour rather for their multitude, then for the conscience: and the same law is, that if the son and the heire of the said J. at Noke, in case that the said gift was made without recompence, alien the land for poverty after the death of his father, the recovery bindeth not but as other recoveries do: for it cannot be thought that the intent of the father was, that any of his heires in taile should for any necessity disherit all other heires in

taile

taile that should come after him, but for himself me thinketh it is reasonable to judge in such manner as I have said before. Sr. And though the intent of the said John at Noke, when he made the said feoffement, and when he tooke againe the said gift in taile, were that if he fell in need that he might alien: yet I suppose that he may not alien, though perchaunce for the more surtie he declared his intent to be such upon the livery of seisin: for that intent was contrary to the gift that he freely took upon him, and when any intent or condition is declared or reserved against the state that any man taketh or receiveth, there such an intent or condition is void by the law, as by a case that hereafter followeth will appeare: that is to say, If a man make a feoffement in fee, upon condition that the feoffee shall not alien to any man, that condition is void, for it is incident to every state of the fee simple, that he that is so seised may alien. And like as in a fee simple there is incident a power to alien, so in a state tail there is a secret intent understood in the gift, that no alienation shall be made. And therefore though the intent of the said Jo. at N. were, that if he fell into poverty that he might sell, and though he at the taking of the gift openly declared his intent to be so: yet the intent should be void by the law as me seemeth, and if it be void by the law, it is also void in conscience, and so the said recovery must be taken in this case to be of the same effect, as recoveries of other lands intailed be, and in no other manner.

§. The fourth question of the Student, concerning Recoveries of Enheritances entailed.

Chap. 30.

If an Annuity be granted to a man to have and to perceive to the grantee, & to the heires of his body, of the rofers of his grantor: and after the grantee sufferеth a recovery against him in a writ of Entre, by the name of a rent in Dale of a like sum as the Annuity is of, with vouchers & judgment after the common course, and both parties intend that the Annuity shall be recovered: whether shall the recovery bind the heire in taile of his Annuity? D. what if it were a rent going out of Land, of what effect should the recovery be then? Stu. It should be then of like effect as if it were of land. Do. And so it seemeth to be of this Annuity, for as me thinketh, a rent and Annuity be of one effect, for the one of them shall be paid in ready money as the other shall. S. Turnet, and yet there be many great diversities betwixt them in the law. D. I pray you shew me some of these diversities. Stu. Mart I shall shew thee, but I wot not whether I can shew thee all, but first thou sha't understand that one diversitie is this. Every Rent, be it Rent service, Rent charge, or Rent secke, is going out of land, but chargeth only the person, that is to say, the Grantor, or his heires that have Assets by discent, or the house if it be granted by a

house

house of Religion to perceive of their cofers. Also of an Annuity there lyeth no action, but only a writ of Annuity against the grantor, his heires, or successors, and that writ of Annuity lyeth never against the pernour, but only against the grantor or his heires: but of a rent, the same action may lye, as doth of lands as the case requireth, and it lyeth sometime of rent against the pernour of the rent, that is to say, against him that taketh the rent wrongfully, and sometime against neither. As of a rent service, Assise may lye for the Lord against the Meine, & the Disseisor, or sometime against the Meine only, if he did also the disseisin. Also an Annuity is never taken for an assets, because it is no freehold in the Law, ne it shall not be put in execution upon a statute Merchant, statute Staple, ne Elegit, as a rent may. And because the said writ of Entre lay not in this case of this Annuity, and that it cannot be intended in the law to be the same Annuity, though it be of like sum with the Annuity, ne though the parties assented and meant to have the same Annuity recovered by the said writ of Entre, therefore the said recovery is void in law and conscience. But if such a recovery be had of rent with a voucher over, then it shall be taken to be of like effect, as recoveries of lands be in such manner as we have treated of before.

§ The fift question of the Student, concerning tailed lands.

Chap.

Chap. 31.

If lands be given to a man and to his wife in the name of her Jointure, by the father of the husband, to have and to hold to them and to the heires of their two bodies, begotten, and after they have issue and the husband dieth, and the wife alieneth the land, & against the statute of 11 H. 7. suffereth a recovery thereof to be had against her to the use of the buyer, and after her son and heire apparent that is heire to the taile releaseth to the recoverers by fine & dyeth, having a brother alive, and after the mother dyeth: who hath right to the land, the buyer, or the brother of him that released? D. what is thine opinion therein, I pray thee shew me. S. Me seemeth that the buyer hath right, for by the said statute made in the 11. yeere of H. 7. among other things it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Ancestors, if the husband suffer any recovery thereof against her, by covin, that then such recovery shall be void, & that it shall be lawfull to him that should have the land after the death of the woman to enter, & it to hold as in his first right: provided allway that that statute shall not extend where he that should have the land after the death of the woman is agreeable to any such alienacion or recovery, so that the agreement be of record. And forasmuch as the heire in this case agreed to the said recovery & fine, which is one of the highest Records in the law, it seemeth that the buyer hath right against that heire that agreed, and

against

against all that shall be heire of the taile, and that not only by the said recovery, but also by the said statute, whereby the said recovery with assent of the heire is affirmed. D. Though the buyer in this case have right during the life of the heire that released, yet nevertheless, after his death his heire as it seemeth may lawfully enter: for the agreement whereof the statute speaketh, must as I suppose either be had before the recovery, or else at the time of the recovery: For if a Title by reason of the said statute be once devolute to the heire in the taile, then the right as me seemeth cannot be extinct nor put away by the onely fine of the heire, no more then if he had dyed, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the Title, nor the right of Entre that is given by the statute: and so as me seemeth, his next heire may therefore enter. S. As I perceive all thy doubt is in this case, because the assent of the heire was after the recovery: for if it had been at the time of the recovery, as if the heire had bin vouched to warrant in the same recovery, and he had entred, and thereupon the judgement had been given, thou agreest well, that the recovery should have avoided the taile for ever.

Doctor. That is true, for it is in expresse words of the Statute, but when the assent is after the recovery, then me thinketh it is not so, ne that the right of the first taile, which was received by the said Statute, shall not be extinct by his fine, no more then it shall in

other

other taile. Scu. I will be advised upon thy opinion in this matter, but yet one thing would I move further upon this Statute, and that is this: Some say that by this statute all other recoveries that have bin had over beside the recoveries of Jointures be affirmed: for they say, that sith the Parliament at the making of this Statute, knew well that many other recoveries were then used and had, to defeat Tailes, that it was like that they would so continue, which nevertheless the Parliament did not prohibit for the time to come, as it did the said Recoveries of Jointures: then it is therefore to suppose, that they thought that they should stand with Law and conscience: but because Jointures were made rather for the saving of inheritance of the husband then to destroy the inheritance, they say that the Parliament thought and adjudged the alienations and recoveries of such Jointures to be against the law & conscience, and not the Alienations of other lands entailed: for if they had, they say that the Parliament would have avoided recoveries of tailed lands generally, as well as it did of Recoveries of Jointures. Do. As to that opinion I will answer thee thus for this time, that though that the makers of the said estatute onely put away recoveries of Jointures, and not other recoveries, that yet it cannot be taken therefore that their intent was that the other Recoveries should stand good & perfect: for they speake them onely of Jointures, because there was no complaint made in the Parliament at that time, but

against

against recoveries had of Jointures, and therefore it seemeth that they intended nothing concerning other recoveries, but that they should be of the same effect as they were before, and no otherwise. And that will appeare more plainly thus: though the makers of the said statute intended to put away & annull such recoveries as should be made of Jointures after a certaine day limited in the Statute, that yet they intended not to avoid ne affirme such recoveries of Jointures as were passed before that time, and if they intended not to avoid ne affirme the recoveries had of jointures before that time, then how can it be taken, that they intended to put away, or affirme, other recoveries that were passed before that time, & not if jointures, that would not affirme, ne put away recoveries passed of jointures before that time? And so, as it seemeth, they intended to spare the multitude of them that were passed of both, and not to comfort any to take them after that time. Stu. I am content thy opinion stand for this time, and I will aske thee another question.

§ The sixth question of the Student concerning tailed lands.

Chap. 32.

IF tenant in taile be disseised, & die, and an ancestor collaterall to the heire in taile release with a warranty, & die, & the warranty discendeth upon the heire in the taile: whether is he there-

therby barred in conſcience, as he is in the law?
D. Becauſe your principall intent at this time is to ſpeak of recoueries, & not of warranties, & alſo becauſe it hath bin of long time taken for a principall maxime of the law, that it ſhould be a barre to the heires aſwell that claime by a fee ſimple, as by ſtate taile, and for that alſo that it was not put away by the ſaid ſtatute of W. 2. which ordained the taile, I will not at this time make thee an anſwer therein, but will take a reſpite to be aduiſed. Stu. Then I pray thee yet or we depart, ſhew me what was the moſt principall cauſe that moued thee to make this queſtion of recoueries had of tailed lands. D. This moued me thereto: I haue perceiued many times that there be many & diuers opinions of thoſe Receiuers: whether they ſtand with conſcience or not, & that it is to doubt that many perſons run into offence of Conſcience thereby. And therefore I thought to ſeeke the minde in them, whether I could perceiue that it were cleere, that they ſerued to breake the taile in law and conſcience, or that it were cleerely againſt conſcience ſo to breake the taile, or that it were a matter in doubt: & if it appeared a matter in doubt, or that it appeared that the matter were uſed cleerely againſt conſcience, then I thought to doe ſomewhat to make the matter appeare as it is, to the intent that they that haue the rule and charge ouer the people as well the ſpirituall men as temporall men, ſhould the rather endeuour them to ſee it reformed for the common wealth of the people, aſwell in deede as in ſoule. For when any thing is uſed to the

dil-

displeasure of God, it hurteth not only the body, but also the soul. And temporall rulers have not only cure of the bodies, but also of the soules, & shall answer for them if they perish in their default. And because it seemeth by the more apparent reason that the tailes be not broken, ne fully avoided by the said recoveries, and that yet nevertheles the great multitude of them that be passed is right much to be pondered: Therefore it were very good to prohibite them for time to come, to put away such ambiguities and doubts as arise now by occasion of the said recoveries, and so they be put as snares to receive the people, and so will they be as long as they be suffered to continue. And me thinketh verily that it were therefore right expedient, that tailed landes should from henceforth either be made so strong in the law, that the taile should not be broken by recovery, fine with proclamation, collaterall warranty, nor otherwise: or else that all tayles should be made fee simple, so that every man that list to sell his land, may sell it by his bare feoffement, & without any scruple or grudge of conscience: & then there should not be so great expences in the law, nor so great variance among the people, ne yet so great offence of conscience as there is now in many persons. S. Verily me thinketh that thy opinion is right good, and charitable in this behalfe: and that the rulers be bound in conscience to looke upon it to see it reformed and brought into good order. And verily by that thou hast said therein, thou hast brought me into remembrance, that there be divers like snares

concerning ſpirituall matters ſuffered among the people, whereby I doubt that many ſpirituall rules be in great offence againſt God. As it is of the point that ſpirituall men have ſpoken ſo much of, that prieſts ſhould not be put to anſwere before lay men, ſpecially of felonies and murders: and of the ſtatute of 45 E.3.c.3. where it is ſaid, that a Prohibition ſhall lye where a man is ſued in the ſpirituall Court for tithe of wood, that is above the age of xx. yeeres, by the name of Silva Cedua as it hath done before: and they have in open ſermons, & in divers other open communications & counſells cauſed it to be openly notified & knowen, that they ſhould be all accurſed that put prieſts to anſwer, or that maintain the ſaid ſtatute, or any other like to it. And after when they have right well perceived, that notwithſtanding all that they have done therein, it hath bin uſed in the ſame points through all the realme, in like manner as it was before: then they have ſat ſtill & let the matter paſſe, & ſo when they have brought many perſons in danger, but moſt ſpecially them that have given credence to their ſaying, & yet by reaſon of the old cuſtom have done as they did before, then there they left them: but verily it is to fear that there is to themſelves right great offence thereby, that is to ſay, to ſee ſo many in ſo great danger as they ſay they be, and to doe no more to bring them out of it, then they have done for it: if it be true as they ſay, they ought to ſtick to it with effect in all charity, till it were reformed: and if it be not as they ſay, then they have cauſed many to offend that have given credence

to them, and yet contrary to their owne conscience doe as they did before, that peraduenture should not haue offended if such sayings had not bin. And so it seemeth that they haue in these matters done either too much, or too little.

And I beseech Almighty God, that some good man may so call upon all these matters, that we haue now communed of, so that they that bee in authority may somewhat ponder them, and to order them in such manner that offence of conscience grow not so lightly thereby hereafter, as it hath done in times past. And verily he that on the Crosse knew the price of mans soule, will hereafter aske a right strait accompt of rulers for euery soule that is under them, and that shall perish through their default.

Thus haue I shewed unto thee in this little Dialogue, how the Law of England is grounded upon the Law of reason, the law of God, the generall Customes of the realme, and upon certaine principles that be called Maximes, upon the particular Customes used in diuers Citties and countries, and upon statutes which haue bin made in divers Parliaments by our Soueraigne Lord the King and his progenitors, and by the Lords Spirituall and Temporall, and all the Commons of the Realme. And I haue also shewed thee in the 9. Chapter of this Booke, under what manner the said generall Customes and Maximes of the law may be proued & affirmed if they were denied, and divers other things be contained in this present Dialogue, which will appeare in

the table that is in the later end of the Booke, as to the readers will appeare. And in the end of the said dialogue, I have at thy desire shewed thee my conceit concerning Recoveries of tailed lands, and thou hast upon the said recoveries shewed mee thy opinion. And I beseech our Lord set them shortly in a good cleere way: for surely it will be right expedient for the well ordering of conscience in many persons, that they be so. And thus the God of peace and love be alway with us.

Amen.

HEre endeth the first Dialogue in English, with new additions, betwixt a Doctor of Divinity, and a Student in the Lawes of England. And hereafter followeth the second.

In the beginning of which Dialogue the Doctor answereth to certain questions, which the Student made to the Doctor before the making of his Dialogue, concerning the Lawes of England and conscience, as appeareth in a Dialogue made betwen them in Latine the 24. ch. And he answereth also divers other questions, that the Student maketh to him in this Dialogue, of the law of England and conscience. And in divers other Chapters of this present Dialogue is couched shortly, how the Lawes of England are to be observed and kept in this Réalme, as to temporall things aswell in Law as in conscience, before any other Lawes. And in some of the Chapters thereof, is also touched that spirituall Judges in divers cases be bound to give their judgements according to the Kings Law. And in the later end of the Booke the Doctor moveth divers cases concerning the Laws of England, wherein he doubteth how they may stand with conscience, whereupon the Student maketh answer in such manner as to the Reader will appeare.

In the latter end of our first Dialogue in Latin, I put divers cases grounded upon the Lawes of England, wherein I doubted, and yet doe, what is to be holden therein conscience. But forasmuch as the time was then farre past, I shewed thee that I would not desire thee to make answer to them forthwith at that time, but at some better leisure, whereunto thou saidst thou wouldest not onely shew thy opinion in these cases, but also in such other cases as I would put: wherefore pray thee now (forasmuch as mee thinketh thou hast good leisure) that thou wilt shew me thine opinion therein. Do. I will with good will accomplish thy desire: but I would that when I am in doubt what the law of this realm is in such cases as thou shalt put, that thou wilt shew me what the law is therein: for though I have by occasion of our first Dialogue in Latine learned many things of the lawes of this realm which I knew not before, yet nevertheless there be many more things that I am ignorant in, and that peradventure in these cases that thou hast put & intendest hereafter to put: & as I said in the first Dialogue in Latin in the 20. Chap. to search conscience upon any case of the law it is in vaine, but where the law in the same case is perfectly knowne. Stu. I am with good will doe as thou saiest, & I intend to put divers of the same questions, that be in the last Chap. of the said Dialogue in Latin, and some time I intend to alter some of them, and to put some new questions to them, as I shall be

in doubt of. D. I pray thee do as thou saist, and I shall with good will either make answer to them forthwith as well as I can, or shall take longer respit to be advised, or else peradventure agree to thine opinion therein, as I shall see cause. But first I would gladly know the cause why thou hast begun this Dialogue in the English tongue, & not in the Latin tongue, as the first cases that thou desiredst to know mine opinion in, be, or in French as the substance of the law. S. The cause is this. It is right necessary to all men in this Realme, both spirituall & temporal, for the good ordering of their conscience, to know many things of the Law of England that they be ignorant in. And though it had bin more pleasant to them that be learned in the Latin tongue, to have had it in Latin rather then in English: yet nevertheless forasmuch as many can read English that understand no Latin, & some that cannot read English, by hearing it read may learn divers things by it, that they should not have learned if it were in Latin: Therefore for the profit of the multitude it is put into the English tongue rather then into the Latin or French tongue. For if it had been in French, few should have understood it, but they that be learned in the law, & they have least need of it, forasmuch as they know the law in the same cases without it, and can better declare what conscience will thereupon, then they that know not the law nothing at all. To them therefore that be not learned in the law of the realme this treatise is specially made: for thou knowest well by such studies thou hast

taken to some knowledge of the Law of the realme that is to them most expedient. Doct. It is true that thou saiest, and therefore I pray thee now proceed to thy questions,

§ The first question of the Student.

Chap. 1.

If tenant in taile after possibility of issue extinct, do wast, whether doth he thereby offend in conscience though hee be not punishable of wast by the law? D. Is the law cleare that he is not punishable for the wast? Stu. Yea verily. D. And what is the law of tenants for terme of life, or for terme of yeares if they do wast? S. They be punishable of wast, by the statute, and shall yeeld treble damages: but at the common law before the statute they were not punishable. D. But whether thinkest thou that before the statute they might have done wast with conscience, because they were not punishable by the Law? St. I thinke not, for as I take it, the doing of wast of such particular tenant for terme of life, for terme of yeares, or of tenants in Dower, or by the courtesie, is prohibited by the Law of reason, for it seemeth of reason, that when such leases be made, or that such titles in Dower, or by the curtesie, be given by the Law, that there is onely given to them the annuall profits of the land, and not the houses and trees, and the gravell to digge and carry away, whereby the whole profit of them in the reversion should be taken away

for ever. And therefore at the common law for waste done by tenant in dower, or tenant by the curtesie, there was punishment ordained by the Law, by a prohibition of waste, whereby they should have yerlie damnages to the value of the waste. But against tenant for terme of life or for terme of yeares, lay no such prohibition, for there was no Maxime in the law therein, against them, as there was against the other. And I thinke the cause was, forasmuch as it was judged a folly in the lessor that made such a lease for terme of life, as for terme of yeares, that at the time of the lease he did not prohibit them they should not doe waste, and sith he did not provide no remedy for himselfe, the Law would none provide. But yet I think not that the intent of the law was, that they might lawfully & with good conscience doe waste, but against Tenants in dower, and by the curtesie the law provided remedy, for they had their title by the law.

And tertly me thinketh that this tenant in tayle as touching of waste, should be like to a tenant for terme of life: for he shall have the land no longer then for term of his life, no more then a tenant for terme of life shall, and the waste of this tenant is as great hurt to him in the reuersion of the remainder, as is the waste of a tenant for terme of life, and if hee alien, the donor shall enter for the forfeiture, as hee shall upon the alienation of a tenant for terme of life, and if he make default in a Precipe quod reddat, the Donor shall be received as he shall be upon the default of a tenant for terme of life:

and therefore me thinketh he shall also be punishable of wast, as tenant for term of life shall. S. If he alien, the donor shall enter as thou saist because the alienation is to his disheritance, & therefore it is a forfeiture of his estate: and that is by an ancient Maxime of the law that giveth that forfeiture in the selfe case, and if he make default in a Præcipe quod reddat, he in the reversion, as thou saist, shall be received, but that is by the statute of West. 2. for at the Common law there was no such receit: and as for the statute that giveth the action of wast against a tenant for terme of life, and for terme of yeeres, it is a statute penall, and shall not be taken by equity: and so there is no remedy given against him neither by common law nor by statute, as there is against tenant for terme of life, & therefore he is unpunishable of wast by the law. D. And though he be unpunishable of wast by the law, yet nevertheless me thinketh he may not by conscience doe that, that shall be hurtfull to the inheritance after his time, sith he hath the land but for terme of his life, no more then a tenant for terme of life may, for then he should doe as he would not be done unto: For thou agreest thy selfe, that though a tenant for terme of life was not punishable of wast before the Statute, that yet the law judged not that he might rightfully and with good conscience do wast. And therefore at this day if a feoffement be made to the use of a man for terme of life, though there lie no action against him for wast, yet he offendeth in conscience if he doe wast, as tenant for terme of life did afore the Statute,

tute, when no remedy lay against him by the law. St. That is true, but there is great diversity between this tenant and a tenant for terme of life: for this tenant hath good authority by the donor to doe waste, and so hath not the tenant for terme of life, as it is said before, for the estate of a tenant in taile after possibility of issue extinct, is in this manner, when lands be given to a man and to his wife, and to the heires of their two bodies begotten, and after the one of them dieth without heires of their bodies begotten, then he or she that overliveth, is called tenant in taile after possibility of issue extinct, because there can never by no possibility be any heire that may inherit by force of the gift. And thus it appeareth that the donees at the time of the gift, received of the donor estate of inheritance, which by possibility might have continued for ever, whereby they had power to cut downe trees, and to doe all things that is waste, as tenant in fee simple might. And that authority was as strong in the law, as if the lessor that maketh a lease for terme of life, say by expresse words in the lease, that the Lessee shall not be punishable of waste. And therefore if the Donor in this case had granted to the Donee that they should not be punishable of waste, that grant had bin void, because it was included in the gift before, as it should be upon a gift in fee simple: and so forasmuch as by the first gift, and by the Livery of seisin made upon the same, the Donees had authority by the Donor to doe waste; therefore though that one of those Donees be now dead without issue, so

that

that it is certaine, that after the death of the other the land shall revert to the donor: yet the authority that they had by the Donour to doe waste, continueth as long as the gift, and the livery of seisin made upon the same continueth. And I take this to be the reason why he shall not have in aid as tenant for terme of life shall, that is to say, for that he cannot aske helpe of that Maxime, whereby it is ordained, that a tenant for terme of life shall have in aid: for he cannot say, but that he tooke a greater estate by the livery of seisin that was made to him, which yet continueth, then for terme of life: and so I thinke him not bound to make any restitution to him in the reversion in this case, for the waste. D. Is thy mind only to prove that this tenant is not bound to make restitution to him in the reversion for the waste? or that thou thinkest that he may with cleere conscience doe all manner of waste? S. I intend to prove no more but that he is not bound to restitution to him in the reversion. D. Then I will right well agree to thine opinion for the reason that thou hast made: but if thy mind had bin to have proved that he might with cleere conscience have done all manner of waste, I would have thought the contrary thereto, and that the tenant in fee simple may not do al maner of waste and destruction with conscience, as to pull downe houses and make pastures of cities and townes, or to doe such other acts which be against the common-wealth. And therefore some will say, that tenant in fee simple may not with conscience destroy his woods & coale-pits whereby a whole coun-

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trey for their money have had full, & yet though he doe so, he is not bound by conscience to make restitution to no person in certain. But now I may thee ere thou proceed to the second case, that thou wilt somewhat shew me what thou meanest when thou saiest, at the common Law it was thus or thus? I understand not fully what thou meanest by that terme, at the common Law. St. I shall with good will shew thee what I meane thereby.

§ What is meant by this terme when it is said, thus it was at the Common Law.

Chap. 2.

The common law is taken three manner of wayes. First it is taken as the law of this realm of England dissevered from all other laws. And under this manner taken, it is oftentimes argued in the Iawes of England, what matters ought of right to be determined by the common Law, and what by the Admirals Court, or by the Spirituall Court: And also if an Obligation beare date out of the realme, as in Spaine, France, or such other, it is said in the Law and truth is is, that they be not pleadable at the common law. Secondly the common law, is taken as the Kings courts of his Bench, or of the Common Place, and it is so taken when a plee is removed out of ancient demesne, for that the land is frank fee and pleadable at the common Law, that is to say, in the Kings court, and not in Ancient demesne.

And

And under this manner taken, it is oftentimes pleaded also in base Courts, as in Courts Barons, the county, and the court of Pipounders, and such other, this matter or that &c. ought not to be determined in that Court, but at the Common Law, that is to say, in the Kings Courts &c. Thirdly, by the Common law is understood such things as were law before any stat. made in that point that is in question, so that that point was holden for Law by the generall or particular customes and Maximes of the Realme, or by the law of reason and the law of God, no other law added to them by statute, nor otherwise, as is the case before rehearsed in the first chapter, where it is said: that at the Common Law tenant by the curtesie and tenant in dower were punishable of wast, that is to say, that before any statute of wast made, they were punishable of wast by the grounds & Maximes of the Law, used before the statute made in that point. But Tenant for terme of life, nor for terme of yeeres, were not punishable by the said grounds and Maximes, till by the Statute remedy was given against them, and therefore it is said, that at the Common Law they were not punishable of wast. Do. I pray thee now proceed unto the second question.

§ The second question of the Student.

Cap. 3.

If a man be outlawed & never had knowledge of the suit, whether may the king take all his goods

goods, and retain them in conscience as he may by the law. D. What is the reason why they be forfeited by the law in that case? Stu. The very reason for that it is an old custome and an old Maxime in the law, that he that is Outlawed shall forfeit his goods to the King, and the cause why that Maxime began, was this: when a man had done a trespasse to another, or another offence wherefore processe of utlary lay, and he that the offence was done to, had taken an action against him according to the Law, if he had absented himselfe and had no lands, there had been no remedy against him: for after the law of England no man shall bee condemned without answer, or that hee appeare and will not answer, except it bee by reason of any Statute. Therefore for the punishment of such offendors as will not appeare to make answer and to bee justified in the Kings Court, hath been used without time of mind, that an attachment in that case should bee directed against him returnable in the Kings Bench or the Common place: and if it were returned thereupon that he had nought whereby hee might bee attached, that then should goe forth a Capias to take his person, and after an Alias Capias, & then a Pluries: and if it were returned upon every of the said Capias that hee could not be found and hee appeared not, then should an Exigent be directed against him which should have so long a day of retourne, that five Counties might be holden before the retourne thereof, and in every of the said five Counties, the defendant to bee so-

solemnly called, and if he appeareth not, then for his contumacie and disobedience of the law, the Coroners to give Judgement that he shall be outlawed, whereby he shall forfeit his goods to the king, and leese divers other advantages in the Law that needeth not here to bee remembred now. And so because hee was in this case called according to the Law and appeared not, it seemeth that the King hath good title to the goods both in law and conscience.

D. If he had knowledge of the suit in very deed, it seemeth the King hath good title in conscience as thou saiest. But if he had no knowledge thereof, it seemeth not so, for the default that is adiudged in him (as appeareth by thine owne reason) is his contumacie and disobedience of the law, and if he were ignorant of the suit, then can there be alligned to him no disobedience: for a disobedience implyeth a knowledge of that he should have obeyed unto.

Stu. It seemeth in this case that hee should be compelled to take knowledge of the suit at his perill: for sith he hath attempted to offend the Law, it seemeth reason that he should be compelled to take heed what the Law will doe against him for it, and not only that, but that he should rather offer amends for his Trespasse then to tarry till he were sued for it.

And so it seemeth the ignorance of the suit is of his owne default, specially sith the law is set such order that every man may know if he will, what suit is taken against him, and may see the Records thereof when hee will: and so it seemeth that neither the party nor

the

the law be not bounden to give him no knowledge therein. And over this I would somewhat move further in this matter thus. That though that action were untrue, and the defendant not guilty, that yet the goods be forfeited to the King, for his not appearance, in law, and also in conscience, and that for this cause: the King as Soveraigne and head of the Law, is bounden of Justice to grant such writs, and such processes as be appointed in the law, to every person that will complaine, be his furmise true or false, and thereupon the King (of Justice) sweth as well to make Processe, to bring the defendant to answer, when he is not guilty, as when he is guilty: and then when there is a Maxime in the Law, that if a man be outlawed in such manner as before appeareth, that he shall forfeit all his goods to the King, and maketh no exception whether the Action bee true or untrue, It seemeth that the said Maxime more regardeth the generall ministration of justice, then the particular right of the party: and therefore the property by the Ordinary, and by the said Maxime ordained for ministration of justice, is altered and is given to the King, as before appeareth, & that both in law and in conscience, as well as if the action were true. And then the party that is so outlawed is driven to sue for his remedy, against him that hath so caused him to be outlawed upon an untrue action.

D. If he have not sufficient to make recompence, or die before recovery can be had, what remedy is had then? S. I think no remedy:

and

and for a further declaration in this case and in such other like cases, where the property of goods may be altered without consent of the owner, it is to consider that the property of goods is not given to the owners directly by the law of reason, nor by the law of God, but by the law of man, & is suffered by the law of reason & by the law of God so to be. For at the beginning all goods were in common, but after they were brought by the law of man into a certain property, so that every man might know his own: and then when such property is given by the law of man the same law may assigne such conditions upon the property as it listeth, so they be not against the law of God, ne the law of reason, and may lawfully take away that it giveth, and appoint how long the property shall continue. And one condition that goeth with every property in this Realme is, if her that hath the property be outlawed according to such proces as is ordained by the law, that he shall forfeit the property unto the King. And divers other cases there be also, whereby property in goods shall be altered in the law, and the right in Lands also without assent of the owner, whereof I shall shortly touch some without saying any authority therein, for the more shortnesse. First by a sale in open market the property is altered. Also goods stolen and seised for the King, or waived, be forfeit unlesse appeale or indictment be sued. Also straies, if they be proclaimed, and be not after claimed by the owner within the yeere, be forfeit, & also a Deodand is forfeit to whom soever the pro-

per-

perty was before (except it belonged to the K.) & shall be disposed for the soule of him that was slain therewith: & a fine with a Nonclaim at the Common law, was a barre, if claime were not made within a yeare, as it is now by statute if the claime be not made within 5. yeares. And all these forfeitures were ordained by the law upon certain considerations which I omit at this time, but certain it is that none of them were made upon a better consideration then this forfeiture of Attaigarie was. For if no especiall punishment should have bin ordained for offendors that would absent themselves & not appeare when they were sued in the Kings courts, many suits in the Kings courts should have bin of small effect. And sith this Maxime was ordained for the execution of Justice, & as much done therein by the common law, as policy of man could reasonably devise, to make the party have knowledge of the suit, and now is added thereto by the statute made the 6 yeere of H. 8. that a writ of Proclamation shall bee sued if the party be dwelling in another shire: it seemeth that such Title as is given to the King thereby is in good conscience, especially seeing that the King is bound to make processe upon the surmise of the plaintife, and may not examine but by plee of the party, whether the surmise bee true or not. But if the party be returned five times called, where indeed he was never called (as in the second case of the last Chapter of the said Dialogue in latin is contained) then it seemeth the party shall have good remedy by petition to the King, espe-

cially if he that made the returne be not sufficient to make recompence, or nil before recovery can be had. Do. Now sith I have heard thine opinion in this case, whereby it appeareth that many things must be seene, or a full and a plain declaration can be made in this behalfe, and seeing also that the plaine answer to this case shall give a great light to divers other cases that may come by such forfeiture: I pray thee give me a further respite, ere that I shew thee my full opinion therein, and hereafter I shall right gladly doe it. And therefore I pray thee proceed now to some other case.

§ The third question of the Student.

Chap. 4.

IF a stranger doe waste in lands that another holdeth for terme of life without assent of the tenant for terme of life, whether may he in the reversion recover treble damages, and the place wasted against the tenant for terme of life according to the statute, in conscience, as he may by the law, if the stranger be not sufficient to make recompence for the waste done? D. As the law cleere in this case, that he in the reversion shall recover against the tenant for terme of life, though that he assented not to the doing of waste? Yea verily, and yet if the tenant for terme of life had been bounden in an Obligation in a certaine sum of money that hee should doe no waste, hee should not forfeit his bond if waste of a stranger, and the liberty is

It hath been used as an ancient Maxime in the law, that tenant by the curtesie & tenant in dower should take the land with this charge, that is to say, that they should do no wast themselves, nor suffer none to be done: and when an action of wast was given after against a tenant for terme of life, then was he taken to be in the same case as to the point of wast; as tenant by the Curtesie and tenant in Dower was, that is to say, that hee should doe no wast, nor suffer none to be done (for there is another Maxime in the law of England, that all cases like unto other cases shalbe judged after the same law as other cases be) and sith no reason of diversity can be assigned why the tenant for terme of life after an action of wast was given against him, should have any more favor in the law then the tenant by the Curtesie, or tenant in Dower should: therefore he is put under the same Maxime as they be, that is to say, that he shall do no wast; ne suffer none to be done: & so it seemeth that the law in this case doth not consider the ability of the person that doth the wast, whether he be able to make recompence for the wast or not, but the assent of the said tenants whereby they have wilfully taken upon them the charge to see that no wast shalbe done. D. I have heard that if houses of these tenants be destroyed with sodaine tempest, or with strange enemies, that they shall not be charged with wast. S. Truth it is. Do. And I think the reason is because they can have no recovery over. S. I take not that for the reason, but that it is an old reasonable Maxime in the Law, that they should

cially if he that made the returne be not sufficient to make recompence, or nie before recovery can be had. Do. Now sith I have heard this opinion in this case, whereby it appeareth that many things must be seene, & a full and a plaine declaration can be made in this behalfe, and seeing also that the plaine answer to this case shall give a great light to divers other cases that may come by such forfeiture: I pray that you give me a farther respite, ere that I shew you my full opinion therein, and hereafter I shall right gladly doe it. And therefore I pray that we proceed now to some other case.

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be discharged in these cases, howbeit some will say that in these cases the law of Reason doth discharge them; and therefore they say, that if a stat. were made that they should be charged in these cases of wast, that the statute were against reason, & not to be observed: but yet nevertheless I take it not so, for they might refuse to take such estate if they would, & if they will take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condition that is appointed thereto by the law, though hurt might follow to them afterward thereby: for it is oftentimes seene in the law, that the law doth suffer him to have hurt without helpe of the law, that will wilfully run into it of his owne act not compelled thereto, and adjudgeth it his folly so to run into it, for which folly he shall also be many times without remedy in conscience. As if a man take land for terme of life, and bindeth himselfe by Obligation that he shal leave the land in as good case as he found it, if the houses be after blowne downe with tempest, or destroyed with strange enemies, as in the case that thou hast put before, he shall be bound to repaire them, or else he shall forfeit his Obligation in law and conscience: because it is his owne act to bind him to it, and yet the law would not have bound him thereto, as thou hast said before. So me thinketh, that the cause why the said tenants be discharged in the law in an action of wast, where the houses be destroyed by fowaine tempest, or by strange enemies, is by a speciall reasonable maxime in the law, where they be excepted from the other generall bond

before

before rehearsed, that is to say, they shall at their perill see that no wast shalbe done, & not by the law of reason: & sith there is no maxime in this case to helpe this tenant, ne that he cannot be holpen by the law of reason, it seemeth that he shalbe charged in this case by his own act both in law & conscience, whether the stranger be able to recompence him or not. D. I doubt in this case whether the maxime that thou speakest of be reasonable or not, that is to say, that tenants by the curtesie & tenants in dower were bound by the common law, that they should do no wast themselves, and over that at their perill to see that no wast should be done by none other. For that law seemeth not reasonable that bindeth a man to an impossibility. And it is impossible to prevent that no wast shalbe done by strangers: for it may be suddainly done in the night, that the tenants can have no notice of, or by great power that they be not able to resist, and therefore me thinketh they ought not to be charged in those cases for the wast, without they may have good remedy over, and then percase the said maxime were sufferable, & else me thinketh it is a maxime against reason. S. As I have said before, no man shall be compelled to take the land upon him, but he that will take the land, & if he will take the land, it is reason he take the charge as the law hath appointed it: and then if any hurt grow to him thereby, it is through his owne act and his owne assent, for he might have refused the lease if he would. D. Though a man may refuse to take estate for terme of life, or for terme of yeres, and a woman may refuse

to take her Dower, yet tenant by the curtesie cannot refuse to take his estate, for immediately after the death of his wife, the possession abideth stil in him by the act of the law without entry: then I put the case that after the death of his wife hee would waive the possession, and after wast were done by a stranger, whether thinkest thou that hee should answer to the wast? S. I think he should by the law. D. And how standeth that with reason, seeing there is no default in him? St. It was his default, and at his owne perill that he would marry an inheritrix: whereupon such danger might follow. D. I put case that he were within age at the marriage, or that the land descended to his wife after he married her. S. There thou movest a farther doubt then the first question is: and though it were as thou saiest, yet thou canst not say, but that there is as great default in him, as is in him in the reversion, and that there is as great reason why he should bee charged with the wast, as that he in the reversion should be disherited and have no manner remedy, ne yet no profit of the land as the other hath: & though the said Maxime may be thought very strait to the said tenants, yet it is for to be favoured as much as may be reasonably, because it helpeth much the common wealth: for it hurteth the common wealth greatly, when woods and houses be destroyed: and if they should answer for no wast, but for wast done by themselves, there might be wast done by strangers, by commandement, or assent, in such colorable manner, that they in the reversion should never have proofe

of

of their assent. Do. I am content thine opinion stand for this time, and I pray thee now proceed to another question.

§ The fourth question of the Student.

Chap. 5.

IF he that is the very heire be certified by the ordinary bastard, & after bring an action as heire against another person: whether may any man knowing the truth, be of counsell with the tenant and plead the said certificat against the demandant by conscience or not? D. Is the law in this case that all other against whom the demandant hath title shall take advantage of this certificat, as well as he at whose suite he is certified bastard? S. Yea verily, & that for two causes, whereof the one is this. There is an old Maxime in the law, that a mischiefe shalbe rather suffered then an inconvenience: & then in this case if another writ should afterward bee sent to another Bishop in another action, to certifie whether he were bastard or not, peradventure the Bishop would certifie that he were mulier, that is to say, lawfully begotten, & then he should recover as heire, & so he should in one selfe court be taken as mulier and bastard: for avoiding of which contrariety, the law will suffer no moe writs to goe forth in that case, & suffereth also all men to take advantage of the certificate, rather then to suffer such a contradiction in the court, which in the law is called an Inconvenience: & the other cause is, because

this certificat of the bishop, is the highest triall that is in the Law in this behalf, but this is not understood, but where bastardy is laid in one that is party to the writ: for if bastardy be laid in one that is a stranger to the writ, as if voucher pray in aid or such other, then that bastardy shalbe tried by xii. men, by which triall he in whom the bastardy is laid, shall not be concluded, because he is not privy to the triall, & may have no attaint, but he that is party to the writ may have attaint, and therefore he shall be concluded & none other but he: and forasmuch as the said Maxime was ordained to eschew an inconvenience (as before appeareth) it seemeth that every man learned, may with conscience plead the said certificat for avoiding therof, and give counsell therein to the party according unto the Law, for else the said inconvenience must needs follow. But yet nevertheless I doe not meane therby, that the party may after, when he hath barred the demandant by the said certificat, retain the land in conscience by reason of the said certificat: for though there be no Law to compell him to restore it, yet I think well that he in conscience is bound to restore it, if he knew that the demandant is the very true heir, wherof I have put divers cases like in the xvii. Chapter of the first Dialogue in Latin, but my intent is that a man learned in the law in this case and other like, may with conscience give his counsell according to the law, in avoiding of such things as the law thinketh should for a reasonable cause be eschewed. D. Though hee that doth not know whether he be bastard

or not, may give his counsell, & also plead the said certificat: yet I think that he that doth know himselfe to be the very true heire may not plead it, and that is for two causes: whereof the one is this: Every man is bound by the law of reason to doe as he would be done to, but I think that if he that pleadeth that certificat were in like case, he would think that no man knowing the certificat to be untrue, might with conscience plead it against him, wherefore no more may hee plead it against none other: The other cause is this, although the certificat be pleaded, yet is the tenant bounden in conscience to make restitution thereof, as thou hast said thy selfe, and then in case that he would not make restitution, then he that pleadeth the plee, should run thereby in like offence, for he hath holpen to set the other man in such a liberty that he may choose whether hee will restore the Land or not, and so hee should put himselfe to ieopardy of another mans conscience. And it is written Eccleiast. 3. Qui amat periculum peribit in illo, that is, hee that wilfully will put himselfe in jeopardy to offend, shall perish therein. And therefore it is the surest way to eschew perils, for him that knoweth that he is heire, not to plead it. And as for the inconvenience that thou saiest must needs follow, but the Certificate be pleaded: As to that it may be answered, that it may bee pleaded by some other that knoweth not that he is very heire, & if the case be so far put that there is none other learned there but hee, then me thinketh that he shall rather suffer the said incon-

inconvenience, then to hurt his own conscience for always, charity beginneth at himselfe, and so every man ought to suffer all other offences rather then he himselfe would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to another question.

S. The fift question of the Student. Chap. 6.

WHether may a man with conscience be of counsel with the plaintif in an action at the common law, knowing that the defendant hath sufficient matter in conscience wherby he may be discharged by a Subpœna in the Chancery, which he cannot plead at the common law, or not? D. I pray thee put a case thereof in certain, for else the question is very generall. S. I will put the same case that thou puttest in our first Dialogue in Latin, the 2. Chap. that is to say: If a man bound in an Obligation pay the money, and taketh no acquitance, so that by the common law he shalbe compelled to pay the money againe, for such consideration, as appeareth in the sayd. Chapter of the said Dialogue, where it is shewed evidently how the law in that case is made upon a good reasonable ground, much necessary for all the people, howbeit, that a man may sometime through his own default, take hurt thereby, wherein I pray thee shew me thine opinion. D. This case seemeth to be like to the case that thou hast next before this, that he that knoweth the payment to be made doth not as he would be done to, if he give counsell that an action should bee taken to have it payed a-

gaine.

gaine, &c. If he be sworne to give counsell according to the Law, as Serjeants at the Law bee, it seemeth he is bound to give counsell according to the Law, for els he should not performe his oath. Do. In these words (according to the law) is understood the law of God, and the law of reason, as well as the law & customes of the Realme, for as thou hast said thy selfe in our first dialogue in latin, that the law of God, and the law of reason, be two speciall grounds of the laws of England, wherefore (as me thinketh) he may give no counsel (saving his oath) neither against the Law of God, nor the law of reason. And certain it is that this article, that is to say, that a man shall do as he would be done to, is grounded upon both the said lawes. And first that it is grounded upon the law of reason, it is evident of it selfe. And in the 6. Chapter of Saint Luke, it is said, Et prout vultis ut faciant vobis homines, & vos facite illis similiter, that is to say, All that other men should doe to you, do you to them, & so it is grounded upon the Law of God, wherefore if he should give counsell against the defendant in that case, hee should doe against both the said lawes, &c. If the defendant had no other remedy but the common law, I would agree well it were as thou said, but in this case he may have good remedy by a Subpœna, and this is the way that shall induce him directly to his Subpœna, that is to say, when it appeareth that the Plaintife shall recover by Law, Doct. Though the Defendant may be discharged by Subpœna, yet the bringing in of his proofes there, shall be to the charge

of

of the defendant, and also the mookes may die or they come in. Also there is a ground in the law of reason, Quod nihil possimus contra veritatem, (that is) we may doe nothing against the truth, and sith hee knoweth it is truth that the money is paid, he may doe nothing against the truth, and if he should be of counsell with the plaintife, he must suppose and averre that it is the very due debt of the plaintife, and that the defendant withholdeth it from him unlawfully, which he knoweth himselfe to be untrue. Wherefore he may not with conscience in this case be of counsell with the plaintife, knowing that the plaintife is paid already, wherefore if thou be contented with this answer, I pray thee proceed to some other question, &c. I will with good will.

§ The seventh question of the Student.

Cap. 7.

A Man maketh a feoffement to the use of him and of his heires, & after the feoffor putteth in his beasts to manure the ground, & the feoffee taketh them as damages feisant, & putteth them in pound, and the feoffor bringeth an action of trespas against him for entring into his ground &c. whether may any man knowing the said use, bee of counsell with the feoffee to avoid the action? D. May hee by the common law avoid that action, seeing that the feoffor ought in conscience to have the profits? S. Yes verily, for as to the Common Law the whole interest is in the

the feoffee, & if the feoffee will breake his conscience, and take the profits, the feoffour hath no remedy by the common Law, but is driven in that case to sue for his remedy by Subpena for the profits, and to cause him to reseoffe him againe, & that was some time the most common case where the Subpena was sued, that is to say, before the Statute of R. 3. but sith the statute, the feoffor may lawfully make a feoffment. But nevertheless for the profits received, the feoffor hath yet no remedy but by Subpena as he had before the said estatute. And so the supposell of his action of trespas is untrue in every point, as to the common law.

D. Though the action be untrue, as to the law, yet hee that sueth it ought in conscience to have that he demandeth by the action, that is to say, damages for his profits, and as it seemeth no man may with conscience give counsell against that he knoweth conscience would have done.

St. Though conscience would hee should have the profits, yet conscience will not that for the attaining thereof the feoffor should make an untrue surmise. Therefore against the untrue surmise every man may with conscience give his counsell, for in that doing he resisteth not the plaintife to have the profits, but he withstandeth him that hee should not maintaine an untrue action for the profits. And it sufficeth not in the Law, ne yet in conscience as me seemeth, that a man hath right to that he sueth for, but that also he sue by a just meanes, and that hee hath both good right, and also a good and a true conveiance to come to his right: for

it

if a man have right to lands, as heire to his father, and he will bring an action as heire to his mother that never had right, every man may give counsel against the action, though he know he have right by another meanes, and so as me thinketh he may doe in dilatories, whereby the party may take hurt if it were not pleaded, though he know the plaintife have right, as if the party or the towne be misnamed, or if the degrees in writs of Entre be mistaken, but if the party should take no hurt by admitting of a dilatory, there he that knoweth that the plaintife hath right, may not plead that dilatory with conscience: As in a Formedon to plead in Abatement of the writ, because he hath not made himselfe heire to him that was last seised, or in a writ of Right, for that the demandant had omitted one that tended right, ne such other, ne he may not assent to the casting of an essoin, nor protection for him, if he know that the demandant hath right, ne he may not vouch for him, except it be that he knoweth that the tenant hath a true cause of a voucher, & of lien, & that he doth it to bring him thereto, & in like wise he may not pray in aid for him, unlesse he know the prayee have good cause of voucher and lien over, or that he know that the prayee hath somewhat to plead that the tenant may not plead as villeine in the demandant, or such other. D. Though the plaintife hath brought an action that is untrue & not maintainable in the Law, yet the defendant doth wrong to the plaintife in the withholding of the proofs as well before the action brought as hanging the action, and

that

that wrong, as it seemeth, the counsellor doth maintaine, & also sheweth himselfe to favour the party in that wrong when hee giveth counsell against the action. 5. If the plaintiffe doe take that for a favor & maintenance of his wrong, he judgeth farther then the cause is given, so that the counsellor doe no more but give counsell against the action, for though he give him counsell to withstand the action for the untruth of it, and that he should not confesse it, and to make thereby a fine to the King without cause, yet it may not stand with reason that he may give counsell to the party to yeeld the profits: and therefore I thinke he may in this case be of counsell with him at the common Law, and be against him in the Chancery, and in either Court give his counsell without any contrariosity, or hurt of conscience. And upon this ground it is, that a man may with good conscience be of counsell with him that hath land by descent: or by discontinuance without title, if he that hath the right bring not his action according to the Law, for the recovering of his right in that behalfe.

§ The seventh question of the Student.

Chap. 8.

If a man take distres for debt upon an obligation, or upon a contract, or such other thing that he hath right title to have, but that he ought not by the law to distrain for it, & nevertheles, he keepeth

eth the same distresse in pound tell he be paid of his duty, what restitution is he bound to make in this case? whether shall he pay the money because he is come to it by an unlawfull meanes, or onely to restore the party for the wrongfull taking of the distres, or for neither, I pray you shew me? D. what is the law in this case? St. That he that is distrained may bring a speciall action of tresspas against him that distraineth, for that he took his beasts wrongfully, & kept them till he made a fine, & therefore he shall recover the fine in damages, as he shall do for the residue of tresspas: for the taking of the mony by such compulsion is taken in the law but as a fine wrongfully taken, though it be his duty to have it. D. Yet though he may so recover, me thinketh that as to the repaiment of the mony he is not bound thereto in conscience, so that he take no more then of right he ought to have, for though he came to it by an unjust meane, yet when the money is paid him, it is his of right & he is not bound to repay it, unles it be recovered as thou saidst, & then when he hath repaied it, he is as me thinketh restored to his first action: but to the redelivery of the beasts with such damages & such hurt as he hath by the distres, I suppose he is bound to make recompence of them in conscience without compulsion or suit in the law: for though he might lawfully have sued for his duty in such manner as the law hath ordred, yet I agree well that he may not take upon him to be his own judge, and to come to his duty against the order of the law, & therfore if any hurt come to the party by the disorder, he is bound to

restore it. But I would think it were the more doubt if a man tooke such a distresse for a trespasse done to him, and keepeth the distres till amends be made for the trespas: for in that case the damages be not in certaine, but be arbitrable, either by the assent of the parties, or by iii. men: & it seemeth that there is no assent of the party in this case, specially no free assent, for that hee doth it by compulsion and to have his distresse againe, and so his assent is not much to be pondered in that case, for all his assenting of him that took the distresse, and so he hath made himselfe his owne Judge, and that is prohibited in all lawes: but in that case where the distres is taken for debt, he is not his own Judge, for the debt was judged in certaine before by the first contract, and therefore some think great diversity betwixt the cases. &c. By that reason it seemeth, that if he that distraineth in the first case for the debt take any thing for his damages, that he is bound in conscience to restore it againe, for damages be arbitrable, and not certaine no more then trespasse is, & me seemeth that both in the case of trespasse and debt, he is bound in conscience to restore that he taketh, for though he ought in right to have like sum as he receiveth, yet he ought not to have the money that he receiveth, for he came to the money by an unjust meanes, wherefore it seemeth he ought to restore it againe. D. And if hee should be compelled to restore it againe, should he not yet (for that he received it once) bee barred of his first action notwithstanding the payment?

S. I will not at this time cleerely assoile thy that question, but this I will say, that if any hurt come to him thereby, it is through his own default, for that he would doe against the law. Nevertheless a little I will say to thy question, that as me seemeth when he hath repayed the money, that he is restored to his first action. If a man condemned in an action of trespas pay the money, and after the defendant reverse the judgement by a writ of Error. And have the money repaid, then the plaintife is restored to his first action. And therefore if he that in the case tooke the money, restore that he tooke by wrongfull distresse, or that he ordered the matter so liberally, that the other murmur not, nor complaine not at it, me seemeth he did very well to be sure in conscience: and therefore I will advise every man to be well ware how he distraineth in such cases against the law. D. Thy counsell is good, & I note much in this case that the party may have an action of trespas against him that distraineth, so that he is taken in the law but as a wrong doer, & therefore to pay the money againe is the sure way, as thou hast said before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

§ For what thing a man may lawfully distraine.

Chap. 9.

A man may lawfully distraine for a rent service, & for all manner of services, as for

may

nage, Fealty, Elevage, suit of Court, reliefes, and such other. Also for a rent reserved upon a gift in taile, a lease for terme of life, for yeares, or at will, if he reserve the reversion, the lessor shall distraine of common right, though there bee no distresse spoken of. But in case a man make a feoffement and that in fee by Indenture, reserving a rent, he shall not distraine for that rent unlesse a distresse be expressly reserved: and if the feoffement bee made without a deed reserving a rent, that reservation is void in Law, and he shall have the rent onely in conscience, and shall not distraine for it. And the Law is where a gift in taile or a lease for termes of life is made, the remainder over in fee reserving a rent, that reservation is void in Law.

Also if a man seised of land for terme of life granteth away his whole estate, reserving a rent, that reservation is void in the Law, without it bee by indenture, and if it bee by Indenture, yet he shall not distraine for the rent, but a distresse bee reserved. Also for Amerciaments in a Leete, the Lord shall distraine. But for Amerciaments in a Court baron he shall not distraine.

Also if a man make a lease at Michaelmas for 4 yeeres, reserving a rent payable at the feast of the Annunciation of our Lady and Saint Mich. the Archangell, in that case he shall distraine for the rent due at our Lady day, but not for the rent due at Michaelmas, because the terme is expire.

But if a man make a lease at the feast of

Christmas for to endure to the feast of Christmas next following, that is to say, for a yeare reserving a rent at the foresaid Feast of the Annunciation of our Lady and Saint Michael the Archangell, there he shall distraine for both the rents, as long as the terme continued, that is to say, till the aforesaid Feast of Christmas.

And if a man have Land for terme of life of John at Noke, and maketh a lease for terme of yeares reserving a rent, the rent is behind, and John at Noke dieth, there he shall not distraine because his reversion is determined.

Also if he to whose use feoffees in seised maketh a lease for terme of yeares, or for terme of life, or a gift in taile reserving a rent, there the reservation is good and the lesor shall distraine.

And if a township bee amerced & the neighbours by assent assesse a certaine summe upon every inhabitant, & agree that if it be not paid by such a day, that certaine persons thereto assigned shall restraine: In this case the distress is lawfull. If Lord and Tenant be, and if the tenant doe hold of the Lord by fealty and rent, and the Lord doth grant away the fealty reserving the rent, and the tenant attourneth, in this case, hee that was Lord may not distraine for the rent, for it is become a rent secke. But if a man make a gift in tayle to another, reserving fealty and certaine rent, and after that he granteth away the fealty reserving the rent and the reversion to himselfe, in this case he shall distraine for the rent, for the grant of the

fealty

fealty is void, for the fealty cannot bee severed from the reversion. Also for heriot service the Lord shall distraine, and for heriot custome he shall seise and not distraine. Also if rent bee assigned to make a partition or assignement of Dower egall, he or shee to whom the rent is assigned may distraine: and in all these cases abovesaid, where a man may distraine, he may not distraine in the night, but for damages feasant, that is to say, where beasts doe hurt in his ground he may distraine in the night. Also for wastes, for reparations, for accompts, for debts upon contracts, or such other, no man may lawfully restraine.

§ The eight question of the Student.

Cap. 10.

If a man doe trespasse, and after make his executors, and die before any amends made: whether be his executors bound in conscience to make amends for the trespasse if they have sufficient goods thereto, though there be no remedy against them by the law to compell them to it? Doct. It is no doubt but they are bound thereto in conscience, before any other deed in charity, that they may doe for him of their own devotion. St. Then would I wit, if the testator made Legacies by his will, whether the Executors be bound to do first, that is to say, to make amends for the trespasse, or to pay the Legacies, in case they have no goods to do both? D. To pay legacies: for if they should first

make recompence for the Trespas and they have not sufficient to pay the Legacies, they should be taken in the Law as Wasters of their testators goods: for they were not compelling by no law to make amends for the trespas, because every trespas dyeth with the person, but the Legacies they should be compelled by the Law spirituall to fulfill, and so they should be compelled to pay their Legacies of their owne goods, and they shall not be compelled thereto by no law nie conscience: but if the case fall that he leave sufficient goods to doe both, that me thinketh they be bound to doe both, and that they be bound to make amends for the Trespasse, before they may doe any other charitable deed for the Testator of their owne minde, as I have said before, except the funerall expences that be necessary, which must be allowed before all other things. S. And what the prooving of the Testament?

D. The Ordinary may nothing take by conscience therefore, if there be not sufficient goods besides for the funerals, to pay the debts, and make restitution. And in likewise the Executors be bound to pay debts upon a simple contract, before any other deed of charity, that they may doe for their Testator of their owne devotion, though they shall not be compelled thereto by the Law. S. And whether thinke thou that they be bound to doe first, that is to say, to make amends for the trespasse, or to pay the debts upon a simple contract. D. To pay the debts, for that is certain, and the trespas is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and other like, I pray thee shew me thy mind, by what law it is, that a man make executors, and that the executors if they take upon them, be bound to perfourme the will, and dispose the goods that remaine for the Testator. D. I think that it is by the Law of reason. S. And mee thinketh that it should be rather by the customs of the Realme. D. In all Countries and in all lands they make Executors. S. That seemeth to be rather by a generall custome, after that the law and customs of property was brought in, then by the law of reason: for as long as all things were in common, there were no Executors ne wils, ne they needed not them, and when property was after brought in, me thinketh that yet making of executors, and disposing of goods by will, after a mans death, followeth not necessarily thereupon, for it might have bin made for a law, that a man should have had the property of his goods onely during his life, and that then his debts payed, all his goods to have been left to his wife and children, or next of his kin, without any legacies making thereof, and so might it now bee ordained by statute, and the statute good & not against reason: wherefore it appeareth that executors have no authority by the law of reason, but by the law of man. And by the old law and customs of the Realme a man may make Executors and dispose his goods by his will, and then his Executors shall have the execution thereof, and his heires shall have nothing, but if any particular customs helpe: and

the executors shal also have the whole possession, and disposition of all his goods and chattels aswell reall as personall, though no word be expressly spoken in the will, that they shall have them: and they shall have also actions to recover all debts due to the testator, though all debts and legacies of the testator be paid before, and shall have the disposition of them to the use of the testator, and not to their owne use: so me thinketh that the authority to make executors, and that they shall dispose the goods for the testator, is by the custome of the Realme: but then I thinke as thou saiest, that by the Law of God they shall be bound to doe the first, that is, to the most profit of the soule of their testator where the disposition thereof is left to their discretion, and that I agree well, is to pay debts upon contracts, and to make amends for wrong done to the testator, though they be not compelled thereto by the law & custome of the Realme, if there be none other debt nor legacie that they be bound to pay by the law: but if two severall debts be payable by the Law, then which debt they shall doe first in conscience, I am somwhat in doubt. D. Let us first know what the common law is therein. S. The common Law is, that if the Testator owe x. l. to two men severally by Obligation, or by such other manner that an action lyeth against his Executors thereof by the Law, and he leaveth goods to pay the one and not both, that in that case he that can first obtaine his Judgement against the Executors, shall have execution of the whole, and the other shall have nothing, but to which of

them

them he shall in conscience owe his favour, the common Law teacheth not. Do. Therein must be considered the cause why the debts began, & then he must after conscience beare his lawfull favour to him that hath the clerest cause of debt, and if both have like cause, then in conscience he must beare his favour where is most need, and greatest charity.

St. May the executors in that case delay that action that is first taken, if it stand not with so good conscience to be payed, as another debt whereof no action is brought, and procure that an action may be brought therefore, and then to confesse that action, that he may so have execution, and then the executors to be discharged against the other? D. Why may he not in that case pay the other without action, and so be discharged in the law against the first?

Stu. No verily, for after an action is taken the executor may not minister the goods so, but that hee leave so much as shall pay the debt, whereof the action is taken: and if he doe not, hee shall pay it of his owne goods, except another recover, and have Judgement against him hanging that action, and that without covin.

D. Then to answer to thy question, I think that by delaies that be lawfull, as by Essoine, Emparlance, or by delatory plee in abatement of the writ that is true, he may delay it: but he may plead no untrue plee to preferre the other to his duty. But I pray thee, what is the law of legacies, restitution, & debts, upon contracts, that percase ought rather after charity

to

to be paid then a debt upon an obligation, what may the favor of the Executor doe in these cases? S. Nothing, for they either performe legacies, make restitutions, or pay debts upon contracts, and keepe not sufficient to pay debts which they are compellable by the Law to pay, that shall be taken as a Devastaverunt bona testatoris, that is to say, That they have wasted the goods of their testator: and therefore they shalbe compelled to pay the debts of their owne goods: & so it is if they pay a debt upon an obligation, whereof the day is yet to come, though it be the cleere debt, and that bee the more charity to have it paid. D. Yet in that case if he to whom the debt is already owing, forbeare till after the day of the other obligation is past, then he may pay him without danger. S. That is true, if there be no action taken upon it, and though there be, yet if that action may be delayed by lawfull meanes, as thou hast spoken of before, till after the day, and that an action is taken upon it, then may the executors confesse the action, and then after Judgement hee may pay the debt without danger of the law. D. Is not that confession of the action so done of purpose, a covin in the Law? S. No verily, for covin is where the action is untrue, & not where the Executors beare a lawfull favor. Do. The Ordinary upon the accompt in all the case before rehearsed, will regard much what is best for the Testator. S. But he may not drive them to accompt against the order of the common Law.

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§ The ninth question of the Student.

Chap. 11.

A Man is indebted to another upon a simple contract in 20. l'. & he maketh his will and bequeatheth 20. l'. to H. Hart and dyeth, and leaveth goods to his executors onely to bury him with, and to performe the said Legacy, and after the said Executors deliver the goods of their Testator in performance of the said bequest: whether is hee to whom the bequest is made, bound in conscience to pay the said debt upon the simple contract, or not? Do. Is he not bound thereto by the Law? Stu. No verily. Do. And what thinkest thou hee is in conscience? S. I thing that he is not bound thereto in conscience, for he is neither Ordinary, Administrator, nor Executor. And I have not heard that any man is bound to pay debts of any man that is deceased, but he be one of those three: for the goods that the Testator left to the Executors were never charged with the debt, but the person of the Testator while he lived was onely charged with the debt, and not his goods, and his Executors that representeth his estate after his death, having goods thereto of the Testators, be charged also with the debts, and not the goods. And therefore if an Executor give away or sell all the goods of the Testator, or otherwise waste them, hee that hath the goods is not charged with the debts in Law nor conscience, but the Executor shall be be charged of his owne

goods

goods. And in like wise if Jo. at Noke owe to A. B. xx. l'. & C. B. oweth to C. D. xx. l'. and after A. B. dyeth intestate having none other goods but the said xx. l'. which the said John at Noke oweth him; yet the said C. D. shall have no remedy against the said Jo. at Noke, for he standeth not charged to him in Law nor conscience. But the Ordinary in this case must commit Administration of the goods of the said A. B. And the said Administrator must levy the mony of the said John at Noke, and pay it to the said C. D. and the said John at Noke shall not pay it himselfe, because he is not charged therewith to him: and no more me thinketh in this case, that he to whom the bequest is made, is neither charged to him that the money was owing to, in the Law or conscience. Doct. Then shew me thy minde by what law it was grounded as thou thinkest that Executors bee bound to pay debts before legacies: whether it is by the Law of God, or by the Law of reason, or by the Law of man, as thou thinkest? S. I think that it is both by the law of reason, & by the law of God: for reason will that they shall doe first that is best for the testator, and that is to pay debts that their testator is bound to pay, before legacies, that he is not bound to. And also by the law of God, they are bound to pay the debts first: for such they are bound by the law of God to love their neighbour, they are bound to doe for him that shall be best for him, when they have taken the charge thereto, as Executors doe when they agree to take the charge of the will of their Testator

upon

upon them: and it is better for the testator that his debt be paid (wherefore his soule shall suffer paine) then that his legacies be performed, wherefore he shall suffer no paine for the performing of them.

And that is to be understood, where the Legacie is made of his own free will, & not where it is made as a satisfaction of any duty. And after the saying of S. Gregory, the very true proofe of love is the deed. But this man is not in that case, for he tooke never the charge upon him to pay the debts of the Testator, and therefore he is not bound to them in Law nor conscience as me seemeth: But rather the executors should have bin ware ere they had payd the legacies, seeing there were debts to pay.

D. The Executors might no otherwise have done in this case, but to pay the Legacies: for then they should have bin compelled by the law to have payd, and so they could not have bin to have payd the debt upon a contract, and therefore they did well in performing of that legacie; but hee to whom the legacie was made ought not to have taken them, but ought in conscience to have suffered them, to have gone to the payment of the debt, and sith he did not so, but took them where he had no right to them, it seemeth that when he took them, he tooke with them the charge in conscience to pay the debt: for sith the executors were compellable by the Law to performe that bequest and not pay the debt, therefore when they performed that bequest, they were discharged thereby against him that the debt was owing to, in the Law and con

sciene

science, and then the charge resteth upon him that tooke the goods where he ought not in conscience to have taken them: but if it had been a debt upon an Obligation, or such other debt, whereupon remedy hath been had against the executors by the Law, I there suppose though that the Executors had performed the legacie, that yet he to whom the legacie was made and performed, had not been charged in conscience to the payment of the debt, for the Executors stood still charged thereto of their owne goods: and hee to whom the bequest was made was only bound in conscience to repay that he received, to the Executors, because he had no right to have received it, for against the Executors he had no right thereto. &c. Then it seemeth in this case that in likewise he to whom the bequest was made, should repay that he received, to the Executors, and then they to pay it rather then he. D. The Executors have no farther meddling with it as this case is, for when they performed the bequest, they were discharged against both the other in Law and conscience, & also he to whom the bequest was made, stood not in this case charged to the executors: for against them he had good title by the Law, and so this charge standeth onely against him that the debt is owing to: and the same Law that is in this case upon a debt upon a contract is if the testator had done a trespasse whereupon he ought to have made restitution, that is to say, that he to whom the bequest is made, is bound to make the amends for the Trespasse: for it should be no discharge to him to

pay

pay it again to the Executors without they paid it over, and it were uncertaine to him whether they should pay it or not.

And therfore to be out of perill, it is necessary that he pay it himselfe, and then he is surely discharged against all men.

§ The tenth question of the Student.

Chap. 12.

A Man seised of certain land in his demeine as of fee, hath issue two sonnes and dieth seised, after whose death a stranger abateth, and taketh the profit, & after the eldest sonne dieth without issue, and his brother bringeth an Assise of Mordaunceſter as sonne and heire to his father, not making mention of his brother, and recovereth the land with damages from the death of his father, as he may well by the Law: whether in this case is the younger brother bound in conscience, to pay to the Executors of the eldest brother, the value of the profits of the said land, that belonged to the eldest brother in his life, or not? Doct. what is thine opinion therein? S. That like as the said profits belonged of right to the eldest brother in his life, and that he had full authority to have released aswell the right of the said land, as of the said profits, which release should have been a cleare barre to the younger brother for ever: That the right of the said damages

which

which bee in the Law but a chattell, belong to his Executors and not to the heire: for no manner of chattell neither reall nor personall shall not after the law of the Realm descend unto the heire.

Do. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make Executors, & dispose of his goods by his will, & that the executors shall have the goods to dispose, but by the law of man: And if it be left to the determination of the law of man, That in such cases as the law giveth such chattels unto the Executors, they shall have good right unto them, and in such cases as the Law taketh such chattels from them, they beene rightfully taken from them: and therefore it is thought by many, that if a man sue a Writ of right of Ward of a Ward that hee hath by his owne fee: and dieth hanging the writ, and his heire sue a Resummons according to the Stat. of West. second, and recovereth: that in that case the heire shall enjoy the wardship against the Executors, and yet it is but a chattell: and they take the reason to bee, because of the said statute, and so might it be ordained by statute that all wards should goe to the heirs, and not to the Executors: Right so in this case, sith the Law is such, that the younger brother shall in this case have an Assise of Mordaunceſtour an heire to his father, not making any mention of his elder brother, and recover damages aswell in the time of his brother, as in his own time: It appeareth that the Law giveth the right of these damages to the heire, and there-

fore

for no recompence ought to bee made to the executors, as me seemeth: & it is not like to a writ of Aiel, where as I have learned in latin (vth our first dialogue) the demandant shall recover damages onely from the death of his father; if he ouer live Aiel: and the cause is, for that the demandant, though his Aiel ouerliued his father, must of necessity make his conueyance by his father, and must make himselfe son & heire to his father, and cousin & heire to his Aiel: and therefore in that case if the father ouerliued the Aiel, the abator were bounden in conscience to restore to the executors of the father the profits run in his time (for no law taketh them from him) but otherwise it is in this case, as me seemeth. St. If the younger brother in this case had entred into the land without taking any assise of Mordancester as hee might if hee would, to whom were the abator then bounden to make restitution for those profits as thou thinkest? D. To the executors of the eldest brother: or in that case there is no law that taketh them from them, & therefore the generall ground, which is that all chattels shall goe to the executors, holdeth in that case: but in this case that ground is broken and holdeth not, for the reason that I have made before. For commonly there is no generall ground in the Law so sure, but it faileth in some particular case.

§ The eleventh question of the Student.

Chap. 13.

A Man seised of land in fee, taketh a wife, & after alieneth the land, & dyeth, after whose

death his wife asketh her dower, and the alienee refuseth to assigne it unto her, but after she asketh her Dower again, and he assigneth it unto her: whether is the alienee in this case bound in conscience, to give the woman damages for the profits for the Land after the third part, from the death of her husband, or from the first request of her Dower, or neither the one nor the other? D. What is the law in this case? St. By the law the woman shall recover no damages, for at the Common Law the demandant in a writt of Dower, should never have recovered damages: but by the Statute of Merton it is ordained, that where the husband dieth seised, that the woman shall recover damages, which is understood the profits of the Land sith the death of her husband, and such damages as she hath by the forbearing of it: but in this case the husband died not seised, wherefore she shall recover no damages by the Law. D. Yet the Law is, that immediately after the death of her husband the wife ought of right to have her dower if shee aske it, though her husband be not seised. S. That is true.

Doct. And sith she ought to have her Dower from the death of her husband, it seemeth that shee ought in conscience to have also the profits from the death of her husband, though she have no remedy to come to them by the Law: For me thinketh that this case is like to a case that thou puttest in our first Dialogue in Latin, the 17. Chapter; That if a tenant for terme of life be disseised and die, and the disseisor dieth, and his heire entreth and taketh the profits,

fits, and after he in the reversion recovereth the lands against the heire, as hee ought to doe by the Law, that in that case he shall recover no damages by the Law: and yet thou wilt well agree, that in that case the heire is bound in conscience to pay the damages to the tenant: dant, and so me thinketh in that case, that the feoffee ought in conscience to pay the damages from the death of her husband, seeing that immediately after his death she ought to have her dower. S. Though she ought to be indowed immediately after the death of her husband, yet shee can lay no default in the feoffee till she demand her dower upon the ground, and that the tenant be not there to assigne it, or if he be there that he will not assigne it: for he that hath the possession of land whereunto any woman hath title of dower, hath good authority as against her to take the profits till she require her dower, for every woman that demandeth dower affirmeth the possession of the tenant not against her: and therefore although the recovery be against, shee leaveth the reversion alway in him against whom she recovereth, though he be a disseisor, and bringeth not the reversion by her recovery to him that hath right as other tenants for terme of life doe. And for this reason it is that the tenant in a Writ of Dower, where the husband died seised, if he appeare the first day, may say to excuse himselfe of damages, that hee is and all times hath been ready to yeeld Dower if it had beene demanded: and so he shall not be received to doe in a Writ of Cuttinage, neither in the case that thou remembrest

above, for in both cases the tenants be supposed by the writ to be wrong doers: but it is not so in this case: & some thinketh it cleere that the feoffee in this case shall never be bound by Law nor conscience to yeeld damages for the time that passed before the request, but for the time after the request is greater doubt: howbeit some think him there not bound to yeeld damages, because his title is good, as is said before, & that it is her default that she brought not her action. D. As unto the time before the request, I hold me content with thine opinion, so that he assign the dower when he is required, but when he refuseth to assigne it, then I thinke him bound in conscience to yeeld damages for both times, though she shall none recover by the Law. And first as for the time after the refusall, it appeareth evidently that when he denieth to assigne her dower, he did against conscience: for he did not that he ought to have done by the law, ne as he would should have bin done to him, & so after the request he holdeth her dower from her wrongfully, and ought in conscience to yeeld damages therefore. And as to the default that thou assignest in her, that she took not her action, that forceth litle, for actions need not, but where the party will not do that he ought to do of right. And for that he ought of right to have done and did it not, he can take no advantage: and then as to the damages before the request, me thinketh him also bounden to pay them, for when he was required to assigne dower and refused, It appeareth that he never intended to yeeld dower from the beginning, & so he is a wrong doer in his own

con-

conscience: & moreover if the husband die seised, the Law is such, that if the tenant refuse to assigne dower when he is required, wherefore the woman bringeth a writ of dower against him, that in that case the woman shall recover damages aswell for the time before the request as after: & yet he ought not in that case after thine opinion to have yeelded any manner of damages if he had bin ready to assign dower when it was demanded, as some thinketh here. S. The cause in the case that thou hast put, is for that the statute is generall that the demandant shall recover damages, where the husband died seised, and that statute hath bin alway construed, that where the tenant may not say, that he is, & hath bin ready alway to yeeld dower &c. that the demandant shal recover damages from the death of her husband. But in that case there is no law of the Realm, that helpeth for the demandant, neither common law nor stat. & furthermore though it might be proved by his refusall, that he never intended from the death of the husband to assigne her dower, yet that proveth not but that he had good right to take the profits of her third part for the time, aswell as he had of his own two parts, till request be made, as is aforesaid: & so me thinketh that notwithstanding the denial, he is not bound to yeeld damages in this case, but for the time of the request, & not for the time before. D. for this time I am content with thy reason.

S. The twelfth question of the Student. Cap. 14.

A Man seised of certain lands, knowing that another hath good right & title to them, le-

vieth a fine with Proclamation, to the intent he would extinct the right of the other man, and the other man maketh no claime within the v. yeares, whether may hee that levied the fine hold the land in conscience as he may doe by the law? D. By this question it seemeth that thou doest agree, that if he that levied the Fine had no knowledge of the other mans right, that his right should then bee extincted by the fine in conscience. St. Yea verily, for thou diddest shew a reasonable cause why it should bee so in our first Dialogue in Latin, the 24. Chapter, as there it appeareth. But if he that levyed a fine and that would extinct the right of another, knew that the other had more right then hee, then I doubt therein: for I take thine opinion in our first Dialogue to bee understood in conscience, where he that would extinct former rights by such a fine with proclamation, knoweth not of any former title, but for his more surety, if any such former right be, he taketh the remedy that is ordained by the law. Do. Whether doest thou meane in this case that thou puttest now that he that hath right, knoweth of the fine, wilfully letting the five yeares pass without claime, or that hee knoweth not any thing of the fine.

St. I pray thee let mee know thine opinion in both cases, and whether thou thinke that hee that hath right bee barred in either of the said causes by conscience as he is by the Law, or not. Do. I will with good wil hereafter shew thee my minde therein: but at this time I pray thee give a little sparing and proceed

now

now for this time to some other question.

§ The thirteenth question of the Student.

Chap. 15.

A Man seised of certaine lands in fee hath a daughter, which is his heire apparant, the daughter taketh a husband, and they have issue, the father dieth seised, and the husband as soone as he heareth of his death, goeth toward the land to take possession, & before he can come there, his wife dieth, whether ought he to have the land in conscience for terme of his life, as remane by the curtesie, because he hath done that in him was to have had possession in his wifes life, so that he might have bin tenant by the curtesie according to the Law, or that he shall neither have it by the Law, nor conscience? D. Is it cleerely holden in the law that he shall not bee tenant by the curtesie in this case, because he had not possession in deed?

S. Yea verily, and yet upon a possession in law a woman shall have her dower, but no man shall be tenant by the curtesie of Land, without his wife have possession in deed. D. A man shall be tenant by the curtesie of a rent though his wife die before the day of payment, and in like wise of an Advowson though shee die before the avoidance. S. That is truth, for the old custome and Maxime of the law is, that he shalbe so, but of land there is no Maxime that serveth him but his wife have possession indeed. D. And what is the reason that there is such a maxime in the

law of the rent & of the advowson, neither then of land when the husband doth as much as in him is to have possession and cannot? S. Some assigne the reason to be, because it is impossible to have possession in deed of the rent: or of advowson before the day of payment of the rent, or before the avoidance of the advowson. D. And so it is impossible that he should have possession in deed of Land if his wife die so soone that he may not by possibility come to the Land after his fathers death, & in her life as the case is. S. The law is such, as I have shewed thee before, and I take the very cause to be, for that there is a Maxim serveth for the rent and the advowson, and not for the lands, as I have said before, and as is said in the 8. chapter of our first Dialogue, it is not alway necessary to assigne a reason or consideration why the Maximes of the Law of England were first ordained & admitted for Maximes, but it sufficeth that they have bin alway taken for law, and that they be neither contrary to the law of reason, nor to the law of God, as this Maxime is not, & therefore if the husband in this case be not holpen by conscience he cannot be holpen by the law. D. And if the law helpe him not, conscience cannot help him in this case, for conscience must alway be grounded upon some law, and it cannot in this case be grounded upon the Law of reason, nor upon the Law of God, for it is not directly by those laws that a man shall be tenant by curtesie, but by the customs of the realm. And therefore if the customs helpe him not, he can nothing have in this case by conscience: for conscience

never resisteth the Law of man, nor addeth nothing to it, but where the law of man is in it selfe directly against the Law of reason, or else the Law of God, and then properly it cannot bee called a Law, but a corruption, or where the generall grounds of the Law of man worke in any particular case against the said Lawes, as it may do, & yet the law good, as it appeareth in divers places in our first dialogue in Latin, or els, where there is no law of man provided for him that hath right to a thing by the law of reason, or by the Law of God. And then sometime there is remedy given to execute that in conscience, as by a Subpena, but not in all cases: for sometime it shall be referred to the conscience of the party, and upon this ground (that is to say) that when there is no title given by the Common Law, that there is no title by conscience: There be divers other cases, whereof I shall put some for an example. As if a Reversion be granted unto one, but there is no attornement: or if a new rent bee granted by word without deed, there is no remedy by conscience, unlesse the said grants were made upon consideration of money or such other. And in like wise where he that is seised of lands in Fee simple maketh a will thereof, that will is void in conscience, because the ground serveth not for him whereby the conscience should take effect, that is to say, the law. And if the tenant make a Feoffement of the land that he holdeth by priority, & taketh estate againe, and dieth (his heire within age) the Lord of whom the land was first holden by priority shall have no remedy, for the body by

conscience, for the law that first was with him, is now against him, & therefore conscience is altered in like wise as the Law altereth. And divers and many cases like bee in the Law that were too long to rehearse now. And thus me thinketh that if the Law be as thou saiest, the husband in this case hath neither right by the Law, nor conscience.

§. The fourteenth question of the Scudent.

Chap. 16.

A Rent is granted to a man in fee to perceive of two acres of land, and after the grantor enfeoffeth the grantee of one of the said acres, whether is the whole rent extinct thereby in conscience as it is in the law? D. This case is somewhat uncertain: for it appeareth not whether the grantor enfeoffed him on trust, or that hee gave the acre to him of his meere motion, to the use of the said feoffee, or else that the feoffement was made upon a bargaine, and if it were but only a feoffement of trust, then I think the whole rent abideth in conscience though it be extinct in the Law: & first that it continueth in that case in conscience, for the part that the grantee hath to the use of the grantor it is evident, for he may not take the profits of the land, and it is against conscience that he should leese both, and in likewise it abideth in conscience for the acre that remaineth in the hands of the grantor, though it be extinct in the Law: For there was a default in the grantor that hee would make the feoffment to the grantee, albeit as there

was

was in the grantee to take it. And it is no conscience that of his owne default hee should take so great availe to bee discharged of the whole rent, seeing that the feoffement was made to his own use. And if the feoffement were made upon a bargaine & a contract between them, then it is to see whether they remembred the rent in their bargaine, or that they remembred it not, & if they remembred it in their bargain & contract, then conscience must follow the bargaine: As thus, if they agree that the Grantee should have the rent after the portion in the other acre, then by conscience hee ought to have it though it be extincted in the Law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience: & if they cleerely forgot it & made no mention of it, or for lack of cunning tooke the Law to be, that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold, then me thinketh it doth continue in conscience after the portions: if the feoffement were made to the use of the grantee, then it seemeth the whole rent is extinct in law and conscience. S. Then take this to be the case, that is to say, that the feoffement was made to the use of the grantee. D. what is then thine opinion therein? S. That the rent should abide in conscience after the portion of the acre remaining in the hands of the grantor, notwithstanding it be extinct in the law. D. Then shew me thine opinion in this that I shall aske thee: Of what law is it that grants of rent and of such other pro-

profits out of lands may be made, and that they shalbe good & effectuall to the grantees, whether it is by the law of reason, or by the law of God, or by the custome & law of the realme. S. I think it is by the law of reason: for by the same reason that a man may give away all his lands, he may as it seemeth give away the profits thereof, or grant a rent out of the land if he will. Do. But then by what Law is it that a man may give away his lands? I trow by none other law but by the custome of the Realme, for by statute all alienations & grants of lands may be prohibited, & then that reason proveth not that grants of the profits of land or of a rent, should be good, because he may alien the land: if alienation of land be by custome and not by the Law of reason, as I suppose it is, whereof I have touched somewhat in our first Dialogue in Latin the 19. Chapter. And also if grants should have their effect by the Law of Reason, then Reason would they should be good by the only word of the Grantor: as well as by his deed. And that is not so, for without deed the grant of rent is void in law: and so me thinketh that grants have their effects onely by the Law of the Realme, &c. Admit it be so, what meanest thou thereby? Do. I shall shew thee hereafter, as I shall shew thee the cause why I think the rent is extinct in conscience, as well as in law. And first as I take it, the reason why it is extinct in the law, is because the rent by the first grant was going out of both acres, and was not going part out of the one acre, and part out of the other, but the whole rent was going out

of

of both, and then when the grantee of his own folly will take estate in the one acre, whereby that acre is discharged, then the other acre also must be discharged, unlesse it should be apportioned, and the law will not that any apportionment should be in that case, but rather insomuch as the party hath by his owne act discharged the one acre, the law discharged also the other, rather then to suffer the other acre to bee charged contrary to the forme of the grant: For this rent beginneth all by the act of the party: And as I have heard, it is called, a rent against common right. Wherefore it is not favoured in the law, as a rent service is: and then me thinketh that for as much as it is not grounded by the law of reason, that grants of rent should be made out of Land, but by custome and Law of the Realm, as I have said before: that so in like wise it remaineth to the Law & custome of the Realm, to determine how long such rents shall continue. And when the law judgeth such rent to bee void, I suppose that so doth conscience also, except the judgement of the law be against the law of reason or the law of God, as it is not in this case. For in this case he that taketh the feoffement hath profit by the feoffement, and knoweth that he hath such a rent out of the land, and that this purchase should extinct it, whereby it appeareth that hee assenteth unto the Law, whereto he was not compelled, and that is his owne act and his owne default so to doe, which shall extinct his whole rent aswell in conscience as in law. But if he have no profit of the land, or be ignorant that hee hath such a rent out of

the land, which is called ignorance of the deed, or if hee bee ignorant that the Law would extinct his whole rent thereby, which is called ignorance of the Law, then me thinketh it remaineth in conscience after the portion. S. Ignorance of the law or of the deed helpeth not but in few cases in the Law of England. D. And therefore it must be reformed by conscience, that is to say, by the law of reason, for when the generall Maxims of the law be in any particular cases against the law of reason, as this Maxime seemeth to be because it excepteth not them that be ignorant, though it be an ignorance invincible, then doth it not agree with the law of reason. S. Me thinketh that ignorance in this case helpeth little: For when a man buyeth any land or taketh it of the gift of any other, he taketh it at his perill, so that if the title be not good, ignorance cannot helpe, for the buyer must be ware what he buyeth: and so in this case if the taking of an acre should extinct the whole rent in conscience, if he were not ignorant, so me thinketh it should in like wise extinct it also though he be ignorant of the law or of the deed: for every man must be compelled to take notice of his owne title, and out of what land his rent is going, and so me thinketh ignorance is but little to be considered in this case. D. If a man buy land or taketh it of gift of another, it is reason that he take it with the perill, though hee be ignorant that another hath right: for it were not standing with reason that his ignorance should extinct the right of another, but in this case there is no doubt of the right of the land:

but

but all the doubt is how the rent shall be ordred in conscience, if he that hath the rent take part of the lande therein is great diversity betweene him that is ignorant in the Law, and him that knoweth the Law, & knoweth well also that he hath a rent out of the land, and other. For I put case that he asked counsell of the grantor himselfe therein, and he saying as he thought, told him that the taking of the one acre should not extinct the rent but for the portion, and so he thinketh the Law to be, tooke the other acre of his gift: Is it not reasonable in that case, that the ignorance should save the Rent in conscience? St. Yes, for there the grantor himselfe is party to his ignorance, and in manner the cause thereof. D. And me thinketh all is one, if any other had shewed him so, or if he asked no counsell at all, for mee thinketh it sufficeth in this case that he be ignorant of the Law: for why, it is more hard in this case to prove the Rent should be extinct in conscience, though he knew it should be extinct in the Law, then to prove that it continueth in conscience after the portion if he be ignorant, and thou thy selfe were of the same opinion, as it appeareth in the beginning of this present Chapter: but if the opinion were true, it would be hard to proove but that the said generall Maxime were wholly against reason, and then it were void, but I have sufficiently answered thereto as mee seemeth, and that it is extinct in the law, & also in conscience, except ignorance help it to be apportioned. And moreover, forasmuch as apportionment is suffered in the Law, where part of the land descen-

descendeth to the grantee, because no default can be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the Law or of the deed, though such ignorance do not excuse in the law of the realm. St. I am content with thy opinion in this behalfe at this time.

§ The fifteenth question of the Student.

Chap. 17.

A Man granteth a Rent charge out of two acres of land, and after the grantor infeoffeth H. H. in one of the said two acres to the use of the said H. H. & of his heires, and after the said H. Hart, intending to extinct all the rent, causeth the said acre to be recovered against him to his owne use in a writ of Entry in le Post in the name of the grantee and of others after the common course, the grantee not knowing of it, and by force of the said recovery the other demandants enter and die living the grantee, so that the grantor is seised of all by the survivor to the use of the said H. H. whether is the said rent extinct in conscience in part, or in all, or no part? D. I am in doubt of the law in this case. S. In what point? Do. whether the whole rent be going out of the acre that remaineth in the hands of the grantor, because the grantee commeth to the land by way of recovery, or that it shall be extinct in law but after the portion, because the grantee hath not the acre to his owne use, or that the

whole

whole rent shall be extinct in the Law. St. The rent cannot be whole going out of the acre that the grantor hath: for this recovery is upon a feigned title, and the grantor because hee is strange to it shall be well received to falsifie it. But if the Recovery had been upon a true title, then it had been as thou saist, if the grantee recover the one acre against the grantor upon a true title, the grantor shall pay the whole rent out of the Land that remaineth in his hand: and as to the use it maketh no matter to the grantor as to the Law in whom the use be: for the possession without the use extinguisheth the whole rent as against him in the law, as well as if the possession and use were both joyned together in the grantee.

Do. Then me thinketh that the said Henry hart is bound in conscience to pay the grantee the rent after the portion of that acre that was recovered, for it cannot stand with conscience that he should loose his rent, and have no profits of land. St. Then of whom shall hee have the other portion of his rent? D. Is the Law cleere that the acre that the grantor hath shall be in this case discharged in the law? S. I take the Law so.

Do. And what in conscience? St. As against the grantor me thinketh also it is extinct in conscience, for the reason that thou hast made in the 16. Chapter. For it is all one in conscience in this case as against the grantor, whether the recovery were to the use of the grantee or not, specially seeing that the grantor is not privy to the recovery: for the unity of possession

is the cause of extinguishment of the rent against the grantor both in law and conscience, wheresoever the use be. But if the grantor had been privie to the cause of extinguishment, as he was in the case that I put in the last Chapter, where the grantor enfeoffed the grantee of one of the acres to the use of the grantee, there it is not extinct in conscience in that acre that remaineth in the hands of the grantor, though it be extinct in the Law, because he was privy to the extinguishment himselfe: but he is not so in this case, & therefore it is extinct against him in law & conscience. And therefore me thinketh that the grantee shall in conscience have the whole rent of the said H. Hart, that caused the said recovery to be had in his name, for in him was all the default: but it is to be understood, that in all the cases, where it is said before in this chapter, or in the chapter next before, that the rent is extinct in the law, and not in conscience, that in such case, all the remedies that the party might first have had for the Rent at the common Law by distresse, assise, or otherwise, are determined, & the party that ought to have the rent in conscience, shall be driven to sue for his remedy by Subpena. D. I am content with thy conceit in this matter for this time.

§ The eighteenth question of the Student.

Chap. 18.

A Villeine is granted to a man for terme of life, the villeine purchaseth Lands to him and

and to his heires, the tenant for terme of life entreth in this case by the Law he shall enioy the lands to him and to his heires, whether shall he doe so in like wise in conscience?

D. Me thinketh it first good to see whether it may stand with Conscience, that one man may claime another to be his villeine, and that he may take from him his lands and goods, and put his body in prison if he will: it seemeth he loveth not his neighbour as himselfe, that doth so to him.

St. That Law hath bin so long used in this Realme and in other also, and hath bin admitted so long in the Lawes of this Realme, and of divers other lawes also, and hath been affirmed by Bishops, Abbots, Priors, and many other men both Spirituall and Temporall, which have taken advantage by the said Law, and have seised the Lands and goods of their villeines thereby, and call it their right enheritance so to doe: that I thinke it not good now to make a doubt, or to put it in argument whether it stand with conscience or not, and therefore I pray thee, admitting the Law in that behalfe to stand in Conscience, shew mee thine opinion in the question that I have made.

D. Is the Law cleere that hee that hath the villeine but onely for term of life, shall have the lands that that villeine purchaseth in fee to him and to his heires?

S. Yea verily I take it so.

D. I should have taken the law otherwise: for

if a Seigniorie bee granted to a man for terme of life and the tenant attourne, & after the land escheat, and the tenant for terme of life entreth, he shall have there none other estate in the land then he had in the Seigniorie: and me thinketh that it should be like Law in this case, and that the Lord ought to have in the Land, but such estate as hee hath in the villeine. S. The cases be not alike, for in the case of the escheate the tenant for terme of life of the Seigniorie, hath the lands in the lieu of the Seigniorie, that is to say, in the place of the seigniorie, & the seigniorie is cleerly extinct: but in this case he hath not the land in the lieu of the villaine, for hee shall have the villaine still as he had before, but he hath the lands as a profit come by meanes of the villaine, which hee shall have in like case as the villaine had them, that is to say, of all goods and chattels hee shall have the whole property, & of a lease for terme of yeares he shall have the whole terme, and for term of life he shall have the same estate, the Lord shall have in the land during the life of the villaine, and of land in fee simple, and of an estate taile that the villaine hath, the Lord shall have the whole fee simple, although he had the villaine but only for terme of yeares, so that he enter or seise according to the law before the villaine alien, or else he shall have nothing.

D. Verily, and if the law be so, I thinke conscience followeth the Law therein. For admitting that a man may with conscience have another man to be his villaine, the judgement of the Law in this case (as to determine what estate the

the Lord hath in the land by his entry) is neither against the Law of reason, nor against the Law of God, and therefore conscience must follow the Law of the Realme. But I pray thee let me make a little digression to heare thine opinion in another case somewhat pertaining to the question, and it is this: If an Executor have a villaine, that his testator had for terme of yeares, & he purchaseth lands in fee, and the executor entreth into the land, what estate hath he by his entry? S. A Fee simple, but that shalbe to the behooke of the testator, & shalbe an assets in his hands. D. Well then I am content with thy conceipt at this time in this case, and I pray thee proceed to another question. Sr. For as much as is appeareth in this case & in some other before, that the knowledge of the Law of England is right necessary for the good ordering of the conscience: I would heare thine opinion, If a man mistake the law, what danger it is in conscience, for the mistaking of it. D. I pray thee put some case in certaine thereof that thou doubtest in, & I will with good will shew thee my minde therein, or else it will bee somewhat long or it can be plainly declared, and I would not be tedious in this writing.

§ The seventeenth question of the Student.

Chap. 19.

A Man hath a Villaine for terme of life, the villain purchaseth lands in fee as in the case

of the last Chapter, and the tenant for terme of life entreth, and after the Willeine dyeth, hee in the reversion pretending that the tenant for terme of life hath nothing in the Land, but for terme of life of the Willeine, asketh counsell of one that sheweth him that he hath good right to the Land, and that hee may lawfully enter, and through that counsell he in the reversion entreth, by reason of the which entrie, great suits and expences follow in the Law, to the great hurt of both parties: what danger is this to him that gave the counsell? Do. Whether meanest thou that hee that gave the counsell, gave it willingly against the Law, or that he was ignorant of the Law? St. That he was ignorant of the Law: for if he knew the Law, and gave counsell to the contrary, I think him bound to restitution, both to him against whom he gave the counsell, and also to this Client (if he would not have sued but for his counsell) of all that they be damnified by it.

D. Then will I yet further aske thee this question, whether he of whom he asketh counsell gave himselfe to learning, and to have knowledge of the Law after his capacity, or that he tooke upon him to give counsell, and tooke no study competent to have learning? for if hee did so, I thinke he be bounden in conscience to restitution of all the costs and dammages that he sustained, to whom he gave counsell, if he would not have sued but through his counsell, and also to the other party. But if a man that hath taken sufficient study

in the Law, mistake the law in some point that is heard to come to the knowledge of, he is not bounden to such restitution, for he hath done that in him is: but if such a man knowing the Law give counsell against the Law, is bound in conscience to restitution of costs and damnages (as thou hast said before) and also to make amends for the untruth.

Stu. What if he aske counsell of one that he knoweth is not learned, and he giveth him counsell in this case to enter, by force whereof hee entreth? Do. Then be they both bound in conscience to restitution, that is to say, the party if he be sufficient, and else the Counsellor because hee assented and gave counsell to the wrong.

St. But what is the Counsellor in that case bounden to him that he gave counsell to? Doct. To nothing: For there was as much default in him that asked the counsell, as in him that gave it, for hee asked counsell of him that he knew was ignorant, and in the other was default for the presumption, that he would take upon him to give counsell in that hee was ignorant.

St. But what if hee that gave the counsell, knew not but that he that asked it, had trust in him, that hee could and would give him good counsell, and that he asked counsell for to order well his conscience, howbeit that the truth was, that he could not so doe?

Do. Then is he that gave the counsell bounden to offer to the other amends, but yet the other may not take it in conscience.

St. That were somewhat perilous: For haply hee would take it though he have no right to it, except the world be well amended. D. What thinkest thou in that amendment? St. I trust every man will doe now in this world as they would be done to, speake as they thinke, restore where they have done wrong, refuse money if they have no right to it, though it be offered them, doe that they ought to doe by conscience, though that they cannot be compelled to it by no Law, and that none will give counsell, but that they shall thinke to be according to conscience, and if they do, to doe what they can to reforme it, and not to intermit themselves with such matters as they be ignorant in, but in such cases to send them that aske the counsell to other, that they shall thinke bee more cunning then they are.

D. It were very well if it were as thou hast said, but, the more pitie, it is not alway so. And especially there is great defaute in givers of counsell, for some for their owne lucre, and profit give counsell to comfort other to sue that they know have no right, but I trust there be but few of them: and some for dread, some for favour, some for malice, and some upon considerations, and to have as much done for them another time to hide the truth. And some take upon them to give counsell in that they be ignorant in, and yet when they know the truth, will not withdraw that they have misdone, for they thinke it should be greatly to their rebuke, and such persons follow not this counsell, that saith That wee have unadvisedly done, let us with

good

good advise revoke againe. S. And if a man give counsell in this Realme after as his learning and conscience giveth him, and regardeth not the Lawes of the Realme, giveth he good counsell? Do. If the Law of the Realme be not in that case against the Law of God, nor against the Law of reason, he giveth good counsell: For every man is bound to follow the Law of the countrey where hee is, so it bee not against the said lawes, and so may the cases bee, that he may bind himselfe to restitution. Stu. At this time I will no further trouble thee in this question.

§ The eighteenth question of the Student.

Chap. 20.

IF a man of his meere motion give lands to H. H. and to his heires by Indenture, upon a condition, that hee shall yeerely at a certain day pay to Jo. at Stile out of the same land a certaine Rent, and if hee doe not, that then it shalbe lawfull to the said Jo. at Stile to enter &c. if the rent in this case be not payed to John at Stile, whether may the said John at Stile enter into the Lands by conscience, though he may not enter by the law? D. May he not enter in this case by the Law, sith the words of the Indenture be that he shall enter? St. No verily, For there is an ancient Maxime in the Law that no man shall take advantage in a condition, but he that is party or privy to the condition, and this man is not party nor privy

where-

wherefore he shall have no advantage of it. D. Though hee can have no advantage of it as party, yet because it appeareth evidently that the intent of the giver was, that if hee were not payed of the rent, that he should have the land: It seemeth that in conscience he ought to have it: though he cannot have it by the Law Stu. In many cases the intent of the party is void to all intents, if it be not grounded according to the law: And therefore if a man make a lease to another for terme of life, and after of his meere motion he confirmeth his estate for terme of life to remaine after his death to another, and to his heires; In this case that remainder is void in law and conscience, for by the law there can no remainder depend upon no estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confirmation enlarged not his estate, nor gave him no new estate. But if a lease be made to a man for terme of another mans life, and after the lessor onely of his meere motion confirmeth the Land to the Lessee for terme of his owne life, the remainder over in Fee, this is a good remainder in the law and conscience: and so me thinketh the intent of the party shall not bee regarded in this case. Do. And in the first case that thou hast put, me thinketh though it passe not by way of grant of that, yet shall it passe, as by the way of remainder of the reversion, for every deed shalbe taken most strong against the grantor, and the taking of the deed in this case is an attornement in it selfe. St. That cannot

not bee, for hee in the remainder is not party to the deed, and therefore it cannot be taken by the way of grant of the reuersion, for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therfore if a man make a lease for terme of life, and after the lessor grant to a stranger that the tenant for terme of life shal have the land to him and to his heires, that grant is void if it bee made onely of his meere motion without recompence. And in like wise if a man make a Lease for terme of life, and after grant the reuersion to one for terme of life, the remainder over in fee, and the Tenant attorneth to him that hath the estate for terme of life onely, intending that hee onely should have advantage of the grant, his intent is void, and both shall take advantage thereof, and the attornement shalbe taken good, according to the grant: And so in this case, though the Feoffor intended that if the rent were not payed, that the stranger should enter, yet because the law giveth him no entry in that case, that intent is void, and the same stranger shall neither enter into the land by law nor conscience. Doct. what shall then be done with that land as thou thinkest after the condition broken? S. I thinke that the feoffor in this case may lawfully reenter, for when the feoffement was made upon condition that the feoffee should pay a rent to a stranger, in those words is concluded in the law, that if the rent were not payd to the stranger, that the feoffor should reenter: for those words upon condition imply so much in the law though it be not expressed.

And

And then when the feoffor went further & said that if the rent were not payd, that the stranger should enter, those words were void in the law: and so the effect of the deed stood upon the first words whereby the feoffor may reenter in law & conscience: but if the first words had not bin conditionall, I would have holden it the greater doubt. Do. I pray thee put the case thereof in certaine with such words as be not conditionall that I may the better perceive what thou meanest therein.

§ The nineteenth question of the Student.

Chap. 21.

A Man maketh a Feoffement by deed indented, & by the same deed it is agreed, that the feoffee shall pay to A. B. and to his heires a certaine rent yearly at certaine dayes, & that if he pay not the rent, then it is agreed that A. B. or his heires shall enter into the land, & after the feoffee payeth not the rent: then the question is, who ought in conscience to have this land and rent. Do. Ere wee argue what conscience will, let us know first what the law will therein. St. I thinke that by the law neither the feoffor, ne yet the said A. B. shall never enter into the Land in this case for non-payment of the rent, for there is no reentry in this case given to the Feoffor for not payment of the rent as there is in the case next before, & the entry that is given to the said A. B. for not payment thereof is void in the law, because her is strange to

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the deed, as it appeareth also in the next chapter before. And therefore me thinketh that the greatest doubt in this case is to see to what use this feoffement shall be taken.

Doct. There appeareth in this case as thou hast put it, no consideration ne recompence given to the feoffor, whereupon any use may be derived: and if the case be so indeed, and that the feoffor declared never his minde therein, to what use shall it then be taken? St. I thinke it shall be taken to bee to the use of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should be bused with payment of the rent having nothing for his labour: ne it may not conveniently be taken that the intent of the feoffor was so, except hee expressed it, and then it must bee taken that hee intended to recompence the feoffee for the business, that he should have in the payment over, and by the words following, his intent appeareth to bee so, as me thinketh, for if the rent were not payed, he would that W. W. should enter, and so it seemeth he intended not to have any use himselfe: and thus me seemeth this case should vary from the common case of uses, that is to say, if a man seised of land make a feoffement thereof, and it appeareth not to what use the feoffement was made, ne it is not upon any bargaine or other recompence, then it shalbe taken to be to the use of the feoffor, except the contrary can be proved by some bargaine, or other like, or that his intent at the time of the delivery of seisin was expressed that it should bee to the use of the feoffee or of some other, and then it

shall

shall goe according to his intent: but in this case me thinketh it shalbe taken that his intent was, that it should first be to the use of the feoffee, for the cause before rehearsed, except the contrary can be proved, & so that knowledge of the intent of the feoffor is the greatest certainty for knowledge of the use in this case as mee seemeth: but when the feoffor goeth further and saith that if the rent be not payd, that then the said A. B. should enter into the Land, then it appeareth that his intent was that the rent should cease, and that A. B. should enter into the Land, and though hee may not by those words enter into the land after the rules of the Law, and to have freehold, yet those words seeme to be sufficient to prove that the intent of the feoffor was, that he should have the use of the land: for sith he had the rent to his owne use, and not to the use of the feoffor, so it seemeth he shall have the use of the land that is assigned to him for the payment of the rent. Do. But I am somewhat in doubt whether hee had the rent to his owne use: for the intent of the feoffor might be that hee should pay the rent for him to some other, or some other use might be appointed thereof by the feoffor. St. If such an intent can be proved, then the intent must be observed: but for bee in this case to wit, to what use it shall bee taken if the intent of the feoffor cannot be proved, and then me thinketh it cannot be otherwise taken, but it shall bee to the use of him to whom it should be payd: for though it bee called a rent, yet it is no rent in Law, ne in the Law he shall never have remedy for it, though it were

were assigned to him, and to his heires without condition, neither by distresse, by assise, by writ of annuity, nor otherwise, but he shall bee driven to sue in the Chancery for his remedy, and then when he sueth in the Chancery, hee must surmise that he ought to have it by conscience, and that he can have no remedy for it in the law. And then, sith he hath no remedy to come to it but by the way of conscience, it seemeth it shall be taken, that when he hath recovered it that he ought to have it in conscience, & that to his owne use, without the contrary can bee proved, and if the contrary can be proved, and that the intent of the feoffor was, that he should dispose it for him as hee should appoint, then hath hee the rent in use to another use, and so one use should bee depending upon another use, which is seldome seene, and shall not be intended till it be proved: and so, sith no such matter is here expressed, me thinketh the rent shall bee taken to bee to the use of him that it is payd to, and the Land in like wise that is appointed to him for non payment of the said rent shall be also to his use, how thinkest thou, will conscience serve therein? Do. I thinke that as thou takest the Law now, that conscience (in this case) and the Law be all one, for the Law searcheth the same thing in this case, to know the case that conscience doth, that is to say, the intent of the feoffor, and therefore I would moove thee further in one thing. St. What is that?

D. That sith the intent of the feoffor shalbe so much regarded in this case, why is ought not also

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to be as much regarded in the case that is in the last chapter next before this, where the words be conditionall, & give the feoffor a title to reenter: for me thinketh, that though the feoffor may in that case reenter for the condition broken, that yet after this entry he shall be seised of the land after his entry to the use of him, to whom the Land was alligned by the said Indenture for lack of payment of the rent, because the intent of the feoffor shall be taken to be so in that case as well as in this. And I pray thee let me know thy mind, what diversity thou puttest betweene them. St. Thou drivest me now to a narrow diversity, but yet I will answer thee therein as well as I can. D. But first ere thou shew me that diversity, I pray thee shew me how Uses began, and why so much Land hath beene put in use in this Realme as hath beene. St. I will with good will say as mee thinketh therein.

§ How uses of land first began, and by what law, and the cause why so much land is put in use.

Cap. 22.

USes were reserved by a secondary conclusion of the law of reason in this manner: when the generall custom of property, whereby every man knew his own good from his neighbors, was brought in among the people: It followed of reason that such lands & goods as a man had, ought not to be taken from him but by his assent

assent or by order of a law: and then sith it is so that every man that hath Lands hath thereby two things in him, that is to say, the possession of the Land which after the Law of England is called the frankstenement or the freehold, & the other is authority to take thereby the profits of the land; wherefore it followeth that he that hath land and intendeth to give only the possession and freehold thereof to another, & to keep the profits to himselfe, ought in reason & conscience to have the profits, seeing there is no law made to prohibite, but that in conscience such reservation may be made. And so when a man maketh a feoffement to another and intendeth that he himselfe shall take the profits, then the feoffee is said seised to his use that so infeoffed him, that is to say, to the use that he shall have the possession & freehold thereof, as in the law, to the intent that the feoffor shall take the profits: & under this manner, as I suppose, uses of land first began. D. It seemeth that the reserving of such use is prohibited by the law, but if a man make a feoffement and reserve the profits, or any part of the profit, as the grasse, wood, or such other, that reservation is void in the law: & me thinketh it is all one to say, that the Law judgeth such a thing if it be done to be void, & that the law prohibiteth that the thing shall not be done. S. Truth it is that such reservation is void in the law as thou saist, and that is by reason of a Parime in the Law, that willeth that such reservation of part of the same thing shall be judged void in the law: but yet the law doth not prohibite that no such reservation shall be made,

but if it be made it judgeth of what effect it shal be, that is to say, that it shall be void, and so he that maketh such reservation offendeth no law thereby, ne breaketh no law thereby, and therefore the reservation in conscience is good: but if it were prohibite by statute that no man should make such reservation, ne that no feoffment of trust should be made, but that all the feoffements should be to the use of him to whom possession of the land is given: then the reservation of such uses against the Stat. should be void, because it were against the law, & yet such a statute should not be a statute against reason, because such uses were first grounded & reserved by the Law of reason, but it should prevent the law of reason, and should put away the consideration whereupon the Law of reason was grounded before the statute made. And then to the other question, that is to say, why so much land hath been put in use, it wil be somewhat long, & peradventure to some, tedious to shew all the causes particularly: but the very cause why the use remained to the feoffor notwithstanding his own feoffment or fine, & sometime notwithstanding a recovery against him, is all upon one consideration after the cause and intent of the gift, fine, or recovery, as is aforesaid. Do. Though reason may serve that upon a feoffment a use may be reserved to the feoffor by the intent of the feoffor against the forme of his gift, as thou hast said before, yet I marvell much how an use may be reserved against a fine, that is one of the highest Records that is in the law, and is taken in the Law of so high effect that it should make an

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ny of all ſtrifes, or againſt a recovery that is obtained in the Law for them that be wronged to recover their right by: and me thinketh that great inconvenience & hurt may follow, when ſuch Records may ſo lightly bee avoided by a ſecret intent or uſe of the parties, & by a blunt and bare averrement & matter indeed, and ſpecially ſith ſuch a matter indeed may be alledged that is not true, whereby may riſe great ſtrife betweene the parties, and great confuſion & uncertainty in the law: but nevertheleſſe ſith our intent is not at this time to treat of that matter, I pray thee touch ſhortly ſome of the cauſes, why there hath been ſo many perſons put in eſtate of lands to the uſe of other, as there hath bin, for as I here ſay, few men bee ſole ſeiſed of their owne land. &c. There hath beene many cauſes thereof, of the which ſome be put away by divers ſtatutes, & ſome remain yet: wherefore thou ſhalt underſtand, that ſome have put their land in feoffment ſecretly, to the intent that they that have right to the Land, ſhould not know againſt whom to bring their action, and that is ſomewhat remedied by divers Statutes that give actions againſt Barrors and takers of the profits. And ſometime ſuch feoffements of truſt have bin made to have maintenance & bearing of their feoffees, which peradventure were great Lords or rulers in the Country: and therefore to put away ſuch maintenance, treble damages be given by ſtatute againſt them that make ſuch feoffements for maintenance. And ſometime they were made to the uſe of Mortmaine, which might then by unde ſuffe-

out forfeiture though it were prohibited that the freehold might not be given in Mortmaine. Wch that is put away by the Statute of R. 2. And sometime they were made to defraud the Lords of wards, reliefes, herriots, and of the lands of their villeines: but those points be put away by divers statutes made in the time of King H. the 7. Sometime they were made to avoid executions upon Statute Staple, Statute Merchant, and Recognisance: & remedy is provided for that, that a man shall have execution of all such lands as any person is seised of to the use of him that is so bound, at the time of execution sued in the 19. yeere of H. 7. And yet remain feoffements, fines and recoveries in use of many other causes, in manner as many as there did before the said estatute. And one cause why they be yet thus used, is to put away tenancy by the curtesie, and titles of Dower. Another cause is, for that lands in use shall not be put in execution upon a statute Staple, statute Merchant, nor Recognisance, but such as be in the hands of the Recognisor at the time of the execution sued. And sometime lands be put in use that they should not be put in execution upon a Writ of Extendi facias ad valentiam. And sometime such uses be made, that hee to whose use &c. may declare his will thereon, & sometime for surety of divers covenants in Indentures of mariage, & other bargaines, & these 2. last articles, be the chief & principall cause why so much land is put in use. Also lands in use be not assets neither in a Formedon nor in an action of Debt against the heire: nd they shall not be put in execution

cution by an Elegit sued upon a recovery as some men say: & these be the very chiefe causes as I now remember, why so much Land standeth in use as there doth: & all the said uses be reserved by the intent of the parties understood or agreed between them, and that many times directly against the words of the feoffement, fine, or recovery, and that is done by the law of reason, as is aforesaid. D. May not a use be assigned to a stranger, as well as to be reserved to the Feoffor, if the Feoffor so appointed it upon his feoffement? Stu. Yes as well, and in like wise to the feoffee, & that upon a free gift without any bargaine or recompence, if the feoffor so will. D. what if no feoffement be made but that a man grant to his feoffee, that from henceforth he shall stand seised to his owne use, is not that use changed, though there be no recompence? Stu. I thinke yes, for there was an use in Esse before the gift, which he may as lawfully give away, as he might the land if he had it in possession. D. And what if a man being seised of land in fee, grant to another of his meere motion without bargain or recompence, that he from thencefoorth shall be seised to the use of the other, is not that grant good? Stu. I suppose that it is not good, for as I take the Law, a man cannot commence an use but by livery of seisin or upon a bargaine or some other recompence. Doct. I hold me contented with that thou hast said in this Chapter for this time, & I pray thee shew me what diversity thou puttest between those two cases that thou hast before rehearsed in the 20. Chapter and in the 21. Chapter of this

preſent booke. &c. I will give good will.

§ The diverſity between two caſes hereafter following, whereof one is put in the 20. Chapter, and the other in the 21. Chapter of this preſent Booke.

Chap. 23.

THe firſt caſe of the ſaid two caſes is this. A man maketh a feoffment by deed indented upon a condition that the feoffee ſhall pay certaine rent yearly to a ſtranger &c. & if he pay it not, that it ſhalbe lawfull to the ſtranger to enter into the land. In this caſe, I ſaid before in the 20. Chapter, that the ſtranger might not enter, becauſe that hee was not privy unto the condition. But I ſaid, that in that caſe the feoffor might lawfully reenter by the firſt words of the Indenture, becauſe they imply a condition in the law, and that the other words, (that is to ſay) that the ſtranger ſhould enter, be void in Law & conſcience. And therfore I ſaid further, that when the feoffor had reentred, that hee was ſeiſed of the land to his owne uſe, and not to the uſe of the ſtranger, though his intent at the making of the Feoffement, were that the ſtranger after his entry, ſhould have had the land to his owne uſe, if he might have entred by the law. And the cauſe why I thinke that the feoffor was ſeiſed in that caſe to his owne uſe, I ſhall ſhew thee afterward. The ſecond caſe is this, a man maketh a feoffement in fee, and in

is agreed upon the feoffement, that the feoffee shall pay a yeerely rent to a stranger, & if he pay it not, that then the stranger shall enter into the land. In this case I said as it appeareth in the said xxi. Chapter, that if the Feoffee payed not the rent, that the stranger should have the use of the land, though he may not by the rules of the law enter into the land: and the diversity betweene the cases me thinketh to be this: In the first case it appeareth as I have said before in the said xx. Chapter, that the feoffor might lawfully reenter by the law for non payment of rent, & then when he entred accordingly, he by that entry avoided the first livery of seisin, in so much that after the reentry hee was seised of the same of the estate as hee was before the feoffement: and so remaineth nothing, whereupon the stranger might ground his use, but onely the bare grant or intent of the feoffor: when he gave the land to the feoffee upon condition that hee should pay the rent to the stranger, and if not, that it should bee lawfull to the stranger to enter: for the feoffement is avoided by the reentry of the feoffor as I have said before: and as I said in the last Chapter, as I suppose, a nude or bare grant of him that is seised of land, is not sufficient to begin an use upon. D. A bare grant may change an use as thou thy selfe agreed in the last chapter, why then may not an use as well begin upon a bare grant? St. when an use is in use, hee that hath the use may of his meere motion give it away if hee will without recompence, as he might the land if hee had it in possession,

will I take it for a ground, that he cannot so begin an use without livery of seisin, or upon a recompence or bargain, and that there is such a ground in the law, that it may not so begin it appeareth thus: it hath bin alway holden for law, that if a man make a deed of feoffement to another, and deliver the deed to him as his deed, that in this case hee to whom the deed is delivered, hath no title ne medling with the land afore livery of seisin be made to him, but only that he may enter and occupy the land at the will of the feoffor, & there is no book saith that the feoffee in that case is seised thereof before livery to the use of the feoffee. And in like wise if a man make a deed of feoffment of 2. acres of land that lie in 2. shires, intending to give them to the feoffee and maketh livery of seisin in the one shire, & not in the other, in this case it is commonly holden in books that the deed is void to the acre where no livery is made, except it lie within that view, save only that he may enter & occupy at will, as is aforesaid: and there is no book that saith that the feoffee should have the use of the other acre, for if an use passed thereby, then were not the deed void unto all intents, and yet it appeareth by the words of the deed that the feoffor gave the lands to the feoffee, but for lack of livery of seisin the gift was void, & so me thinketh it is here without livery of seisin be made according: but in the 2. case of the said 2. cases the feoffee may not reentry for non-payment of the rent, and so the first livery of seisin continueth & standeth in effect, and thereupon the first use may well begin and take effect in the stranger of the land

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when the rent is not payd unto him accoꝛding to the firſt agreement. And ſo me thinketh that in the firſt caſe the uſe is determined, becauſe the livery of ſeiſin, whereupon it commenced, is determined, and that in the ſecond caſe the uſe of the land taketh effect in the ſtranger foꝛ not payment of the rent by the grant made at the firſt livery, which yet continueth in his effect, & this me thinketh is the diverſity betweene the caſes. Doct. Yet notwithſtanding the reaſon that thou haſt made, me thinketh that if a man ſeiſed of lands, make a gift thereof by a nude promiſe without any livery of ſeiſin oꝛ recompence to him made, and grant that he ſhall be ſeiſed to his uſe, that though the promiſe bee void in the law, that yet nevertheleſſe it muſt hold and ſtand good in conſcience and by the law of reaſon, foꝛ one rule of the law of reaſon is, that we may doe nothing againſt the truth, and ſith the truth is that the owner of the ground hath granted that hee ſhalbe ſeiſed to the uſe of the other, that grant muſt needs ſtand in effect, oꝛ elſe there is no truth in the grantoꝛ. Stu. It is not againſt the truth of the grantoꝛ in this caſe, though by the grant hee bee not ſeiſed to the uſe of the other, but it proveth that he hath granted that the Law will not warrant him to grant, wherefoꝛe his grant is void. But if the grantoꝛ had gone further and ſaid, that hee would alſo ſuffer the other to take the profits of the lands without let oꝛ other interruption, oꝛ that hee would make him eſtate in the land when he ſhould bee required, then I think in thoſe caſes he were bound in conſcience

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by that rule of the Law of reason that thou hast remembred to performe them, if he intend to be bounden by his promise, or else he should goe against his owne truth, and against his owne promise. But yet it shall make no use in that case, nor he to whom the promise is made shall have no action in the Law upon that promise, though it be not performed, for it is called in the Law a Nude or naked promise. And thus me thinketh, that in the first case of the said two cases, the grant is now avoided in the law by the reentry of the feoffor, and that the feoffor is not bounden by his grant neither in law nor conscience, but in that second case he is bound, so that the use palleth from him, as I have said before. D. I hold me content with thy conceit for this time, but I pray thee shew me somewhat more at large what is taken for a Nude contract, or naked promise in the Lawes of England, and where an action may lye thereupon, and where not. St. I will with good will say as me thinketh therein.

§ What is a Nude contract, or naked promise after the Lawes of England, and whether any action may lye thereupon.

Chap. 24.

FIrst it is to be understood, that contracts be grounded upon a custom of the realme, and by the law that is called jus gentium, and not directly by the law of reason, for when all things were in common, it needed not to have contracts

tracts, but after property was brought in, they were right expedient to all people, so that a man might have of his neighbour that he had not of his owne, and that could not bee lawfully but by his gift, by way of lending, concord, or by some leafe, bargaine, or sale: and such bargains and sales be called contracts, and be made by assent of the parties upon agreement betweene them, of goods or lands, for money, or for other recompence, but of mony usuall, for mony usuall is no contract. Also a concord is properly upon an agreement betweene the parties, with divers articles therein, some ruling on the one part and some on the other, as if I at Stile letteth a Chamber to Henry Hart, and it is farther agreed betweene them, that the said H. Hart shall goe to board with the said John at Stile, and the said Henry Hart to pay for the chamber and boarding a certaine summe &c. this is properly called a Concord, but it is also a contract, and a good action lieth upon it. Howbeit it is not much argued in the Lawes of England what diversity is betweene a contract, a concord, a promise, a gift, a lone, or a pledge, a bargaine, a covenant, or such other. For the intent of the law is to have the effect of the matter argued and not the termes. And a nude contract is, where a man maketh a bargaine, or a sale of his goods or lands, without any recompence appointed for it: As if I say to another, I sell thee all my land, or all my goods, and nothing is assigned that the other shall give or pay for it, this is a Nude contract, and as I take it, it is void in the law and conscience: and a Nude

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or naked promise is, where a man promiseth another to give him certaine money such a day, or to build an house, or to do him such certain service, & nothing is assigned for the mony, for the building, nor for the service: these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to another to keepe him such certaine goods safely to such a time, & after I refuse to take them, there lyeth no action against me for it: But if I take them and after they be lost or impayred through my negligent keeping, there an action lyeth. D. But what opinion hold they that be learned in the law of England in such promises that be called naked or nude promises: whether doe they hold that they that make the promise, be bounden in conscience to perform their promise, though they cannot be compelled thereto by the law, or not? S. The bookes of the Law of England entreat little thereof, for it is left to the determination of Doctors, and therefore I pray thee shew me somewhat now of thy mind therein, & then I shal shew thee therein somewhat of the minds of diuers, that be learned in the law of the Realme. D. To declare the matter plainly after the saying of Doctors, it would aske a long time, and therefore I will touch it briefly to give thee occasion to desire to heare more therein hereafter. First thou shalt understand that there is a promise that is called an Vowe, and that is a promise made to God, and he that doth make such a vow upon a deliberate minde intending to performe

forme it, is bound in conscience to do it, though it be onely made in the heart without pronouncing of words, and of other promises made to a man upon a certain consideration, if the promise be not against the Lawes: as if B. promise to give B.xx. l'. because he hath made him such a house, or hath lent him such a thing, or such other like, I thinke him bound to keepe his promise. But if his promise be so naked, that there is no manner of consideration why it should be made, then I thinke him not bound to performe it, for it is to suppose that there was some errour in the making of the promise: but if such a promise be made to an Universitie, to a city, to the Church, to the Clergy, or to poore men of such a place, or to the honour of God, or such other cause like, as for maintenance of learning, of the common wealth, of the service of God, or in relefe of poverty, or such other, then I thinke that he is bound in conscience to performe it, though there be no consideration of worldly profit, that the grantor hath had or intendeth to have for it: and in all such promises it must be understood that he that made the promise intended to bee bound by his promise, for else commonly after all Doctors her is not bound, unlesse he were bound to it before his promise: as if a man promise to give his father a gowne that hath need of it, to keepe him from cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before. And after some Doctors a man may bee excused of such a promise in conscience by casualty that commeth after the promise, if it be so that if he

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knowne of the casualty at the making of the promise hee would not have made it. And also such promises if they shall bind, they must be honest, lawfull, and possible, and els they are not to be holden in conscience, though there be a cause &c. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but onely a spirituall profit, as in the case before rehearsed of a promise made to an Universitie, to a Citie, to the Church, or such other, and with a cause as to the honour of God, there is most commonly holden that an action upon those promises lyeth in the Law Canon. St. whether doest thou meane in such promises made to an Universitie, to a City, or to such other as thou hast rehearsed before, and with a cause as to the honour of God or such other, that the party shall be bound by his promise, if he intended not to be bound thereby, yea or nay? Do. I thinke nay; no more then upon promises made unto common persons. St. And then met thinketh clearely, that no action can lye against him upon such promises, for it is secret in his owne conscience, whether he intended for to be bound or nay. And if the intent inward in the heart, mans law cannot judge, and that is one of the causes why the Law of God is necessary (that is to say) to judge inward things, and if an action should lye in that case in the law Canon, then should the law Canon judge upon the inward intent of the heart, which cannot be as we feeneth. And therefore after divers that be learned in the lawes of the Realme, all promises shall be taken in this

manner

manner, that is to say, If he to whom the promise is made, have a charge by reason of the promise which he hath also performed: then in that case he shall have no action for that thing that was promised, though hee that made the promise have no worldly profit by it. And if a man say to another, Heale such a poore man of his disease, or make an high way, and I shall give thee thus much, and if he doe it, I thinke an action lyeth at the common law. And moreover though the thing that hee shall doe bee all spirituall, yet if he performe it, I thinke an action lyeth at the common Law. As if a man say to another, Fast for me all the next Lent, and I shall give thee twenty pounds, and hee performeth it, I thinke an action lyeth at the common Law. And in like wise if a man say to another, Marry my daughter and I will give thee twenty pounds, upon this promise an action lyeth, if hee marry his daughter: And in this case hee cannot discharge the promise though hee thought not to bee bound thereby, for it is a good contract, and he may have Quid pro quo, that is to say, the preferment of his daughter for his money. But in those promises made to an Universitie, or such other as thou hast remembred before, with such causes as thou hast shewed that is to say, to the honour of God, or to the increase of learning, or such other like, where the party to whom the promise was made is bound to no new charge, by reason of the promise made to him, but as he was bound to before, there they thinke that no action lyeth against him, though hee performe not his

his promise, for it is no contract, and so his own conscience must be his judge whether he intended to be bound by his promise or not. And if he intended it not, then he offendeth for his dissimulation only, but if he intended to be bound, then if he perform it not, untruth is in him, and hee proveth himselfe to be a lyer, which is prohibited aswell by the law of God, as by the law of reason: And furthermore many that be learned in the Law of England hold, that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as hee is in the other cases that thou hast remembred of a promise made to the Church, or the Clergy, or such other: for they say that as much untruth is in the breaking of the one as of the other, and they say that the untruth is more to be pondred then the person to whom the promises be made. D. But what hold they if the promise be made for a thing past, as I promise thee xl. l'. for that thou hast builded me such a house, lyeth an action there? S. They suppose nay, but hee shall be bound in conscience to performe it after his intent, as is before said. D. And if a man promise to give another xl. li. in recompence for such a trespasse that he hath done him, lyeth an action there? S. I suppose nay, & the cause is, for that such promises be no perfect contracts: for a contract is properly where a man for his money shall have by assent of the other party certaine goods or some other profit at the time of the contract or after: but if the thing be promised for a cause that is past by way of a recompence, then it is rather an accord

then

contract, but then the Law is, that upon such accord the thing that is promised in recompence must be payd, or delivered in hand, for upon an accord there lyeth no action. D. But in the case of trespasse whether hold they that he be bound by his promise, though he intended not to bee bound thereby. S. They think nay, no more then in the other cases that be put before. Do. In the other cases he was not bound to that he promised, but onely by his promise, but in this case of trespasse, he was bound in conscience before the promise to make recompence for the trespasse: and therefore it seemeth that he is bound in conscience to keepe his promise, though he intended not to be bound thereby.

S. Though hee were bound before the promise to make recompence for his trespas, yet he was not bound to no summe in certaine but by his promise: and because that the summe may bee too much, or too little, and not equall to the trespasse, and that the party to whom the trespasse was done notwithstanding the promise is at liberty to take his action of trespasse if hee will, therefore they hold that he may bee his owne Judge in conscience, whether he intended to bee bound by his promise or not, as hee may in other cases, but if it were of a debt, then they hold that he is bound to performe his promise in conscience. Doct. what if in the case of Trespasse hee affirmeth his promise with an oath. S. Then they hold that hee is bound to performe it for saving of his oath, though he entended not to be bound, but if hee entended to be bound by his promise, then they say, that

an oath needeth not but to enforce the promise, for they say, he breaketh the law of reason, which is, that we may doe nothing against the truth, aswell when he breaketh his promise that he thought in his owne heart to be bound by, as he doth when he breaketh his oath, though the offence be not so great by reason of the periury. Moreover to that thou sayest that upon such promises that thou hast rehearsed before, shall lye an action after the law Canon, verily as to that in this Realme there can no action lye thereon in the spirituall court, if the promise be of a temporall thing, for a prohibition, or a Premunire facias should lye in that case. D. That is marvell sith there can no action lye thereon in the Kings court as thou saist thy selfe. S. That maketh no matter, for though there lye no action in the Kings Court, against executors upon a simple contract, yet if they bee sued in the case for the debt in the Spirituall Court, a prohibition lyeth. And in like wise if a man sweare his law untruly in an action of debt upon a contract in the Kings Court, yet he shall not bee sued for the periury in the spirituall Court, and yet no remedy lyeth for the periury in the Kings Court: for the prohibition lyeth not onely, where a man is sued in the Spirituall Court of such things, as the party may have his remedy in the Kings Court, but also where the Spirituall Court holdeth plee in such case, where they by the Kings prerogative, and by the ancient custome of the Realme ought not to hold. Doct. I will take advisement upon that thou hast said in this matter, till another time,

time, and I pray thee now proceed to another question.

§ The twentieth question of the Student.

Chap. 25.

A Man hath two sons, one borne before espousels, and the other after espousels, and the father by his will bequeatheth to his sonne and heire all his goods, which of these two sons shall have the goods in conscience? D. As I said in our first dialogue in Latin, the last Chap. the doubt of this case dependeth not in the knowing what conscience will in this case, but rather in the knowing which of the sons shall bee judged heire (that is to say) whether he shall be taken for heire that is heire by the Spirituall Law, bee that is heire by the Law of the Realme, or else that it shall be judged for him that the father tooke for heire? St. As to that point, admit the fathers minde not to be knowen, or else that his mind was that he should be taken for heire that should be judged for heire by the Law, that in this case it ought to be judged by. And then I pray thee shew mee thy minde therein, for though the question be not directly depending upon the point to see what conscience will in this case, yet it is right expedient for the well ordering of conscience, that is be knowen after what law it shalbe judged: for if it ought to be judged after the temporall Law who would be heire, then it were against conscience, if the Judges in the Spirituall Law should

Judge him for heire that is heire by the spirituall Law, and I think they should bee bound to Restitution thereby, and therefore I pray thee shew me thine opinion, after what Law it shall be judged. D. Me thinketh that in this case it shalbe judged after the law of the Church, for it appeareth that the bequest is of goods, and therefore if any suit shall be taken upon the execution of the will for the bequest, it must be taken in the Spirituall Court, and when it is depending in the Spirituall Court, me thinketh it must be judged after the Spirituall law: for of the Temporall law they have no knowledge, nor they are not bound to know it as me thinketh, and more stronger not to Judge after it. But if the bequest had been of a chattell reall, as of a lease for terme of yeares, or of a ward, or such other, then the matter should have come in debate in the Kings Court, and then I thinke the Judges there should judge after the Law of the Realme, and that is, that the ponger brother is heire, and so me thinketh the diversity of the Courts shall make the diversity of judgement. Stu. Of that might follow a great inconvenience as mee seemeth, for it might be such a case that both chattels reall, and chattels personall were in the will, & then after thine opinion, the one sonne should have the chattels personall, and the other sonne the chattels reall, and it cannot be conveniently taken as me thinketh, but that the fathers will was, that the one sonne should have all, and not be divided. Therefore me thinketh that he shalbe judged for heire that is heire by the common law:

and that the Iudges Spirituall in this cale be bound to take notice what the common law is, for ſith the things that be in variance bee temporall, that is to ſay, the goods of the father, it is reaſon that the right of them in this realme ſhall be determined by the Law of the Realme. D. How may that be? for the Iudges ſpirituall know not the law of the Realme, ne they cannot know it as to the moſt part of it, for much part of the law is in ſuch ſpeech that fewe men have knowledge of it, & there is no meanes, ne familiarity of ſtudy between them that learne the ſaid Lawes: for they be learned in ſeverall places, and after divers wayes, and after divers manners of teachings, and in divers ſpeeches, and commonly the one of them have none of the Bookes of the other, and to bind the ſpirituall Iudges to give Iudgement after the Law that they know not, ne that they cannot come to the knowledge of it, ſeemeth not reaſonable. Stu. They muſt doe therein as the Kings Iudges muſt do, when any matter commeth before them that ought to bee iudged after the Spirituall law, whereof I put divers cales in one firſt Dialogue in Engliſh the vii. Chapter, that is to ſay, they muſt either take knowledge of it by their own ſtudy, or els they muſt enquire of them that be learned in the law of the Church, what the law is, and in like ſuche muſt they doe. But it is to doubt, that ſome of them would be loth to aske any ſuch queſtion in ſuch caſe, or to confeſſe that they are bound to give their iudgement after the temporall Law, and ſurely they may rightly offend their conſcience.

D. I suppose that some be of opinion that they are not bound to know the Law of the Realm, and verily to my remembrance I have not heard that Judges of the spirituall Law are bound to know the Law of the Realme.

St. And I suppose that they are not only bound to know the Law of the Realme, or to do that in them is to know it, when the knowledge of it is openedy the right of the matter that dependeth before them, but that they be also bounden to know where and in what case they ought to judge after it, for in such cases they must take the Kings Law as the Law Spirituall in that point, & are bound in conscience to follow it, as it may appeare by divers cases, whereof one is this. Two Joinctenants be of goods, and the one of them by his last will bequeatheth all his part to a stranger, and maketh the other Joinctenant his Executor and dyeth, if he to whom the bequest is made, sue to the other Joinctenant, upon the legacy as Executor &c. Upon this matter shewed, the Judges of the Spirituall Law are bound to judge the will to be void, because it is void by the Law of the Realme, whereby the Joinctenant hath right to the whole goods by the title of the Survivor, and is judged to have the goods not by the first gift which is before the title of the will, and must therefore have preferment in the elder title, and if the Judges of the Spirituall Court judge otherwise, they are bound to restitution: and by like reason the Executors of a man that is outlawed at the time of his death may discharge themselves in the Spir-

Spiritual Court of the performing of legacies, because they be chargeable to the King, and yet there is no such law of vntagary in the Spirituall Law.

D. By occasion of that thou hast said before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall Law hath ordained, is not that alienation sufficient, though it have not the solemnities of the Temporall Law, &c. I am in doubt therein if the portion be under the fourth part of the value of the Church: but if it be to the value of the fourth part of the Church, or above, it is not sufficient, and therefore was the writ of right of Dismes ordained: and if in a writ of right of Dismes it be judged in the Kings Court for the Patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Judges of the Spirituall Law, are bound to give their judgement according to the judgement given in the Kings Court. And in like wise if a Parson of a Church agree to take a pension for the tithe of a Mill, if the pension bee to the fourth part of the value of the Church or above, then it must be alienated after the solemnities of the Kings Laws, as lands and tenements must, or else the Patron of the successor of him that alieneth, may bring a writ of right of dismes, and recover in the Kings Court, and then the Judges of the Spirituall Court are bound to give judgement in the Spirituall Courts accordingly, as is aforesaid. D. I have heard say, that a writ of right of Dismes is

given by the statute of West. 2. and that speaketh only of dismes, & not of pensions. S. where a Parson of a Church is wrongfully defeized of his Dismes, and is let by an Indicavit to aske his Dismes in the Spirituall Court, then the Patron may have a writ of Right of Dismes by the statute that thou speakest of, for there lay none at the Common Law, for the Parson had there good right, though he were let by the Indicavit to sue for his right. But when that Parson had no remedy at the Spirituall law, there a writ of right of Dismes lay for the Patron by the common law, aswell of pensions as of Dismes, and some say that in such a case it lay of lesse then of the fourth part by the common Law, but that I passe over. And the reason why it lay at the common Law, if the Dismes or pensions were above the fourth part &c. was this: by the Spirituall law the alienation of the Parson with the assent of the Bishop and of the Chapter shall barre the successor without assent of the Patron, and so the Patron might leese his patronage and be not assenting thereto: for his Incumbent might have no remedy but in the Spirituall Court, and there he was barred, wherefore the Patron in that case shall have his remedy by the common law where the assent of the Ordinary and Chapter without the Patron shall not serve, as it is said before. But where the Incumbent had good right by the Spirituall Law, there lay no remedy for the Patron by the common Law, though the Incumbent were let by an Indicavit, and for that cause was the said Statute made, and it

lieth

lieth as well by the equity for offerings and pensions, as for Dismes. Then further I would thinke that where the Spirituall Court may hold plee of a temporall thing, that they must judge after the temporall Law, and that ignorance shall not excuse them in that case: for by taking of their office they have bound themselves to have knowledge of as much as belongeth to their office, as all Judges be, spirituall, or temporall. But if it were in argument in this case, whether the eldest sonne might be a Priest because he is a bastard in the temporall Law, that should be judged after the spirituall Law, for the matter is spirituall. D. Yet notwithstanding all the reasons that thou hast made, I cannot see how the judges of the Spirituall Law, shall be compelled to take notice of the temporall law, seeing that the most part of it is in the French Tongue, for it were hard that every Spirituall Judge should be compelled to learne the Tongue. But if the Law of the Realme were set in such order that they that intend to study the Law Canon, might first have a sight of the Law of the Realme, as they have now of the Law Civill, and that some Bookes & Treatises were made of cases of conscience concerning these two Lawes, as there be now concerning the Law Civill & the law Canon, I would assent that it were right expedient, and then reason might serve the better, that they should be compelled to take notice of the Law of the Realm, as they be now bound in such countries as the Law Civill is used to take notice of that Law.

Stu.

St. Me thinketh thine opinion is right good and reasonable, but till such an order be taken, they are bound as I suppose, to enquire of them that be learned in the common Law, what the Law is, and so to give their judgement according, if they will keepe themselves from offence of conscience. And forasmuch as thou hast well satisfied my mind in all these questions before, I pray thee now that I may somewhat frete thy mind in divers articles that be written in divers books for the ordering of conscience upon the Law Canon and Civill: for me thinketh that there be divers conclusions put in divers bookes, as in the Summes called summa Angelica, and summa Rosella, and divers other, for the good order of conscience, that be against the law of this Realme, and rather blind consciences, then doe give any light unto it.

Do. I pray thee shew me some of those cases.

St. I will with good will.

§ Whether an Abbot may with conscience present to an Advowson of a Church that belongeth to the house without assent of the Covent.

Chap. 26.

IT appeareth in the Chapter, Et agnoscitur de his quæ sunt à Prælatis, the which Chapter is recited in the sum called summa Angelica, in the title Abbas, the xxvij. article, that he may not without any custome, or any speciall privi-

priuiledge to helpe therein. St. Truth it is, that there is such a Decretall, but they that be learned in the lawe of England, hold the decretall bindeth not in this Realme, & this is the cause why they doe hold that opinion: By the Lawe of the Realme the whole disposition of Lands and goods of the Abbey is the Abbots only for the time that he is Abbot, and not in the Covent: for they bee but as dead persons in the Lawe, and therefore the Abbot shall sue and be sued onely without the Covent, doe homage, fealty, attorne, make leases, and present to advowsons onely in his owne name: and they say further, that this authority cannot be taken from him, but by the Lawe of the Realme, and so they say, that the makers of the decretall exceeded their power: wherefore they say it is not to be holden in conscience, no more then if a Decree were made that a lease for terme of yeares or at will made by the Abbot without the Covent should be immediatly void, & so they thinke that the Abbot may in this case present in his owne name without offence of conscience, because the said Decretall holdeth not in this Realme. Do. But many be of opinion, that no man hath authority to present in right and conscience to any benefice with Cure but the Pope, or he that hath his authority therein derived from the Pope: for they say that forasmuch as the Pope is the Vicar generall under God, and hath the charge of the soules of all people that be in the flock of Christs Church, it is reason that sith hee cannot minister to all, no doe that is necessary to all people for their

soules

soules health in his owne person, that hee shall assigne deputies for his discharge in that behalfe. And because Patrons claime to present to Churches in this Realme by their owne right, without Title derived from the Pope, they say that they usurpe upon the Popes authority: and therefore they conclude that though the Abbot have title by the law of the Realme to present in this case in his owne name, that yet because that title is against the Popes prerogative, that that title, ne yet the Law of the Realme that maintaineth that title, holdeth not in conscience. And they say also that it belongeth to the Law Canon to determine the right of presentment to benefices, for it is a thing spirituall and belongeth to the spirituall jurisdiction, as the deprivation from a benefice doth, and so they say the said Decretall bindeth in conscience, though in the Law of the Realm it bindeth not. Stu. As to the first consideration I would right well agree, that if the Patrons of Churches in this Realme claimed to put incumbents into such Churches as should fall void of their Patronage without presenting them to the Bishop, or if they claimed that the Bishop should admit such incumbent as they should present without any examination to bee made of his ability in that behalfe, that that claime were against reason and conscience, for the cause that thou hast rehearsed: But forasmuch as the Patrons in this Realme claime no more but to present their Incumbents to the Bishop, and then the Bishop to examine the ability of the Incumbent, and if he find him

by

by the Examination not able to have cure of soules, he then to refuse him, and the Patron to present another that shall be able, and if he be able, then the Bishop to admit him, institute him, & induct him, I think that this claime, and their presentments thereupon stand with good reason and conscience. And as to the second consideration, it is holden in the Lawes of the Realme that the right of presentment to a Church, is a temporall inheritance, & shall descend by course of inheritance from heire to heire as lands and tenements shall, & shalbe taken as assets as lands and tenements be: and for the triall of the right of patronages be ordained in the Law divers actions for them that be wronged in that behalfe, as writs of right, of Advowson, Assises of Darrein presentment, Quare impedit, and divers other which alway without time of mind have bin pleaded in the Kings Courts, as things pertaining to his Crown and royall dignity: and therefore they say that in this case his lawes ought to be obeyed in Law and conscience. D. If it come in variance whether he that is so presented bee able or not able, by whom shall the ability be tried? Stu. If the Ordinary be not party to the action, it shall be tryed by the Ordinary, and if he be party it shall be tried by the Metropolitan. Doct. Then the Law is more reasonable in that point then I thought it had been: but in the other point I will take advisement in it till another time, and I pray thee shew me thy minde in this point: If an Abbot name his covent with him in his presentation, doth that make the presentation void

void in the law, or is the presentation good thy notwithstanding?

Scu. I think it is not void therefore, but the naming of them is void, and a thing more then needeth. For if the Abbot be disturbed, he must bring his action in his own name without the Covent. D. Then I perceive well that it is not prohibited by the Law of England, but that the Abbot may name the Covent in his presentation with him, and also take their assent whom hee shall present if hee will: and then I hold it the surest way, that hee so doe, for in so doing he shall not offend neither in Law, nor conscience. S. To take the assent of the Covent whom he shall present, and to name them also in the presentation, knowing that he may doe otherwise, both in Law and Conscience if he will, is no offence: but if he take their assent, & name them with him in the presentation, thinking that he is so bound to doe in law and conscience, setting a conscience where none is, and regardeth not the Law of the Realme, that will discharge his conscience in this behalfe, if hee will, so that he present an able man as he may doe without their assent, there is an error, and offence of conscience in the Abbot. And in like wise if the Abbot present in his owne name, and therefore the Covent saith that hee offendeth in conscience, in that he observeth not the law of the Church, for that he taketh not their assent, then they offend in judging him to offend that offendeth not. And therefore the sure way is in this case to judge both the said laws of such effect as they be, and not to set an offence

of

of conſcience by breaking of the ſaid Decree, which ſtandeth not in effect in this behalf within this Realme.

§ If a man find beaſts in his ground doing hurt, whether may hee by his owne authority, take them and keepe them till hee be ſatisfied of the hurt.

Cap. 27.

THis queſtion is made in the ſumme called ſumma Roſella, in the title of Reſtitution, that is to ſay, Reſtitutio 13. the 9. Article, and there it is anſwered, that hee may not take them for to hold them as a pledge till he be ſatisfied for the hurt: but that he may take them and keepe them till he know who oweth them, that hee may thereby learne againſt whom to have his remedy. Is not the law of the realme in like wiſe? S. No verily, for by the Law of the Realme, hee that in that caſe hath the hurt, may take the beaſts as a diſtreſſe, and put them in a pound Overt, ſo it bee within the ſame ſhire, & there let them remaine till the owner will make him amends for the hurt. D. what calleſt thou a pound Overt? Stu. A pound Overt is not onely ſuch a pound as is commonly made in Townes and Lordſhips, for to put in beaſts that bee diſtrained, but it is alſo every place where they may be in lawfully, not making the owner an offender for their being there: And that it bee there alſo, that the owner

owner may lawfully give the beasts meat and drink while they be in pound.

D. And if they die in pound for lack of meat whose jeopardy is it? St. If it be such a pound overt as I speake of, it is at the perill of him that oweth the beasts, so that he that had the hurt shall be at liberty to take his action for the trespasse if hee will: and if it bee not a lawfull pound, then it is at the perill of him that distrained, and so it is if he drive them out of the shire and they dye there.

D. I put case that he that oweth the beasts, offer sufficient amends, and the other will not take it, but keepeth the beasts still in pound, may not the owner take them out? St. No, for he may not be his owne judge, and if he doe, an action lyeth against him for breaking of the pound: but he may sue a Replevin to have his beasts delivered him out of the pound, and thereupon it shall be tryed by 12. men, whether the amends that was offered were sufficient or not, and if it be found that the offer was not sufficient, then he that hath the hurt shall have such amends as the 12 men shall asselle. D. If it bee found by the 12 men, that the amends were sufficient, shall he that refuseth to take it, have no punishment for his refusall, and for keeping of the beasts in pound after that time? St. I thinke no, but that he shall yeeld damages in the Replevin, because the issue is tried against him.

D. I put case that the beasts after the refusal die in pound for lack of meat, at whose jeopardy is it then? St. At the jeopardy of him that

owed

ewed the beasts, as it was before: for her is bound at his perill by reason of the wrong that was done at the beginning, to see that they have meat as long as they shalbe in pound, unlesse the Kings writ come to deliver them, and he resisteth it: for after that time it will be at his jeopardy if they die for lacke of meat, & the damages shalbe recovered in an action brought upon the Statute for disobeying the Kings writ.

§ Whether a gift made by one under the age of xxv. yeares be good.

Cap. 28.

IT appeareth in Summa Angelica in the title donatio prima the 7 article, that a man before the age of 25. yeeres may not give without it be with the authority of his tutor: Is it not likewise at the Common Law? St. The age of Infants to give, or sell their lands and goods in the Law of England is at 21. yeere, or above, so that after that age the gift is good, and before that age it is not good, by whole assent soever it be, except it be for his meat, and his drinke or apparell, or that he do it as executor, in performance of the will of his testator, or in some other like cases, that need not to be rehearsed here: & that age must be observed in this realm in law & conscience, & not the said age of 25. yeer. Do. I put case, it were ordained by a decree of the Church, that if any man by his will bequeathed goods to another, & willeth that they

shalbe delivered to him at his full age, & that in that case 25. yeeres shalbe taken for the full age, shall not that decree be observed and stand good after the law of England? S. I suppose it shall not, for though it belong to the Church to have the probate and the execution of Testaments made of goods & chattels, except it be in certain Lordships & seigniories that have them by prescription, yet the church may not as me seemeth determine what shall be the lawfull age for any person to have the goods, for that belongeth to the King & his laws to determine: & therefore if it were ordained by a statute of the realme, that hee should not in such case have the goods till hee were of the age of 25. yeers, that stat. were good & to be observed aswel in the spiritual law as in the law of the realme; and if a statute were good in that case, then a decree made therof is not to be observed, for the ordering of the age may not be under two severall powers, and the property of every good law of man is, that the maker exceed not his authority: and I think that the Spirituall Judge in that case ought to judge the full age after the law of the Realme, seeing that the matter of the age concerneth temporall goods: and I suppose farther that as the king by authority of his Parliament may ordaine that all wils shall be void, & that the goods of every man shalbe disposed, in such manner as by statute should be assigned, that more stronger he may appoint at what age such wills as be made shalbe performed. D. Thinkest thou then that the king may take away the power of the Ordinary, that he shal not call executors

to

accompt? &c. I am somewhat in doubt therein, but it seemeth that if it might be enacted by statute that all wills should be void, as is aforesaid, that then it might be enacted, that no man should have authority, to call none to accompt upon such wills, but such as the statute shall therein appoint, for he that may doe the more, may doe the lesse: notwithstanding I will nothing speake determinately in that point at this time, ne I meane not, that it were good to make a statute that all wills should be void, for I thinke them right expedient, but mine intent is, to prove that the common law may ordain the time of the full age, aswell in wills of temporall things as otherwise, and also that wills shalbe made. And if it may so doe, then much stronger it belongeth to the Kings lawes to interpret wills concerning temporall things, aswell when they come in argument before his Judges as when they come in argument before spiritual Judges, and that they ought not to be judged by severall lawes (that is to say) by the spirituall Judges in one manner, and by the Kings Judges in another manner.

If a man be convict of heresie before the Ordinary, whether his goods be forfeited.

Chap. 29.

IT appeareth in Summa Angelica in the title Donatio prima the 13. article, that he that is an heretick may not make executors, for in the

law his goods be forfeit: what is the law of the realme therein? S. If a man be convict of heresy and abjure, hee hath forfeit no goods, but if hee be convict of heresie, & be delivered to lay-mens hands, then hath he forfeit all his goods that he hath at that time that hee is delivered to them, though he bee not put in execution for the heresie: but his lands he shall not forfeit, except he be dead, for the heresie, & then he shall forfeit them to the Lords of the fee, as in case of felony, except they be holden of the Ordinary, for then the King shall have the forfeiture, as it appeareth by a statute made the second yeere of H. 5. cap. 7. D. Wee thinketh that as it belongeth onely to the Church to determine heresies, that so it belongeth to the Church to determine what punishment hee shall have for his heresie, except death, which they may not be judges in: but if the Church decree, that he shall therefore forfeit his goods, me thinketh that they be forfeit by that decree. S. Nay verily, for they be temporall, and belong to the judgement of the Kings Court, and I thinke the Ordinary might have set no fine upon one impeached of heresie, till it was ordained by the Statute of H. 4. that he may set a fine in that case if he see cause, & then the King shall have that fine, as in the said stat. appeareth.

§ Where divers patrons of an Advowson, and the Church voideth, the patrons vary in their presentments, whether the Bishop shall have liberty to present which of the incumbents that he will, or not.

Cap.

Cap. 30.

THis question is asked in Summa Rosell, in the title Patronatus the 9. Article, & there it appeareth by the better opinion, that hee may present whether clerk he will, howbeit the maker of the said sum saith, by the rigor of the law, the Bish. in such case may present a stranger, because the patrons agree not: & in the same chap. Patronatus the 15. article, it is said, that he must be preferred that hath the most merits & hath the most part of the patrons: and if the number be egall, that then it is to consider the merits of the patron, and if they be of like merit, then may the Bishop command them to agree and to present again. And if they cannot yet agree, then the liberty to present is given to the Bishop to take which he will: & if he may not yet present without great trouble, then shall the Bishop order the Church in the best manner he can: & if he cannot order it, then shall he suspend the Church, & take away the relicks to the rebukes of the patrons: and if they will not so be ordered, then must hee ask help of the temporalty: And in the 15 article of the said title Patronus, it is asked, whether it be expedient in such case, that the more part of the patrons agree, having respect to all the patrons, or that it sufficeth to have the more part in comparison of the lesse part, as thus: There be foure patrons to present one clerk: the first and second present one, the third presenteth another, and the fourth another: hee that is presented by 2. hath not the more part in comparison of all the patrons, for they be egall, but hee hath the more part having respect to

the other presentments: to this question it is answered, that either the presentment is made of them that be of the colledge, & there is requisit the more part having respect to all the colledge, or else every man presenteth for himselfe, as commonly doe lay-men that have the patronage of their patrimony, and then it sufficeth to have the more part in respect of the other parties, doth not the law of England agree to these diversities? S. No verily. D. what order then shall be taken in the law of England, if the patrons vary in their presentments? S. After the laws of England this order shalbe taken: If they be joint-tenants, or tenants in common of the patronage, & they vary in presentment, the Ordinary is not bound to admit none of their clerks, neither the more part nor the lesse, & if the 6. months passe, or they agree, then he may present by the laps, but he may not present within the 6. months, for if he do, they may agree and bring a Quare imp. against him, & remove his clerk, & so the Ordinary shall be a disturber: and if the patrons have the patronage by descent as coperceners, then is the Ordinary bound to admit the clerk of the eldest sister, for the eldest shall have the preferment in the law, if she will, & then at the next avoidance the next sister shall present, and so by turne one sister after another, till all the sisters or their heires have presented, & then the eldest sister shall begin again: and this is called a presenting by turne, & it holdeth alway betweene coperceners of all advowson, except they agree to present together, or that they agree by composition to present in some other manner, & if they doe so, they

agree

agreement must stand: but this must be alway except, that if at the first avoidance that shalbe after the death of the common ancestor, the king have the ward of the youngest daughter, that then the King by his prerogative shall have the presentment, & at the next avoidance the eldest sister, and so by turne. But it is to understand that if after the death of the common ancestor the Church voideth, and the eldest sister presented together with another of the sisters, and the other sisters every one in their owne name or together, that in that case the ordinary is not bound to receive none of their clerkes, but may suffer the Church to run into the laps, as it is said before: for he shall not be bound to receive the clerk of the eldest sister, but where shee presenteth in her owne name. And in this case where the patrons vary in presentment, the Church is not properly said Litigious, so that the Ordinary should be bound at his perill to direct a writ to inquire de jure patronatus: for that writ lyeth where 2. present by severall titles, but these patrons present al in one title, & therefore the ordinary may suffer it to passe, if he will, into the laps: and this manner of presentments must be observed in this realme in law and conscience.

§ How long time the patron shall have to present to a benefice.

Cap. 31.

This question is asked in Summa Angelica in the title Jus patronat' the 16. Article, & there it is answered, that if the patron be a layman, that he shal have 4. months, and if he be a

Clerke, he shall have 6 months. S. And by the common law he shall have 6 months whether he be a lay man or a clerke, and I see no reason why a clerke should have more respit then a lay man, but rather the contrary. D. From what time shall the 6 months be accompted? S. That is in divers maners after the maner of the avoidance, for if the Church void by death, creation, or cession, the 6 months shall be counted from the death of the incumbent, or from the creation, or cession, whereof the patron shall be compelled to take notice at this perill: & if the voidance be by resignation or deprivation, then the 6 months shall begin when the Patron hath knowledge given him by the Bishop of the resignation or deprivation. D. What if hee have knowledge of the resignation or deprivation, and not by the Bishop, but by some other, shall not the 6 months begin then from the time of that knowledge? S. I suppose that it shall not begin till hee have knowledge given him by the Bishop. D. An union is also a cause of voidance, how shall the 6 months be reckoned there? S. There can no union be made but the Patrons must have knowledge, and it must be appointed who shal present after that union, that is to say, one of them or both, either joyntly or by turne one after another, as the agreement is upon the union, and if the Patron is privy to the avoidance, and is not ignorant of it, the 6 months shall bee accompted from the agreement. Doct. I see well by the reason that thou hast made in this chapter, that ignorance sometime excuseth in the Law of England, for in

some

some of the said avoidances it shall excuse the Patrons, as it appeareth by the reasons above, and in some it shall not: wherefore I pray thee shew me somewhat where ignorance excuseth in the Law of England, and where not after thine opinion. St. I will with good will hereafter doe as thou saiest if thou put mee in remembrance thereof. But I would yet move thee somewhat further in such questions as I have moved thee before, concerning the diversities betweene the Laws of England and other laws: for there be many moe cases thereof, that as mee seemeth have right great need, for the good order of conscience of many persons, to be reformed; and to bee brought into one opinion both among spirituall and temporall: as it is in the case where Doctors hold opinion, that the statute of lay men that restraine liberty to give lands to the Church should be void, and they say farther, that if it were prohibit by a stat. that no gift should be made to forreines that yet a gift made to the Church should be good, for they say, that the inferiour may not take away the authority of the superior; and this saying is directly against the statutes, whereby it is prohibit, that lands should not be given into Mortmain: & they say also that bequests & gifts to the Church must be determined after the law Canon, and not after the laws & statutes of lay men, and so they regard much to whom the gift is made, whether to the Church, or to make causwaies, or to common persons, & beare more favor in gifts to the Church then to other: and the law of the Realme beholdeth the thing that is

given

given and pretended, that if the thing that is given, be of lands or goods, that the determination thereof of right belongeth in this Realme to the Kings lawes, whether it be to spirituall men or temporall, to the Church, or to other, and so is great division in this behalfe, when one preferreth his opinion, and another his, and one this jurisdiction, and another that, and that as it is to feare more of singularity then of charity: wherefore it seemeth, that they that have the greatest charge over the people, specially to the health of their soules, are most bound in conscience before other to look to this matter, and to do that in them is in all charity to have it reformed, not beholding the temporall jurisdiction nor spirituall jurisdiction, but the common wealth, and quietnesse of the people: and that undoubtedly would shortly follow, if this division were put away, which I suppose verily will not bee, but that all men within the realm both spirituall and temporall be ordred and ruled by one law, as to temporall things: notwithstanding, forasmuch as the purpose of this writing is not to treat of this matter, therefore I will no farther speake thereof at this time. Do. Then I pray thee proceed to another question, that thou saiest thy mind is to do. S. I will with good will.

§ If a man bee excommenged, whether he may in any case be assoiled without making satisfaction.

Cap. 27.

IN the Summe called Summa Rosella, in the title Absolutio quarta, the second article, it is said,

said, that he that is excommunicat for a wrong, if he be able to make satisfaction, ought not to be assoiled but he do satisfie, and that they offend that do assoile him, but yet nevertheless he is assoiled, and if he be not able to make amends that he must yet be assoiled, taking a sufficient gage to satisfie if he be able hereafter, or else that he make another to satisfie if he be able. And these sayings in many things hold not in the Lawes of England. D. I pray thee shew me wherein the law of the realme varieth therefore. St. If a man be excommunicat in the spirituall court for debt, trespasse, or such other things as belong to the Kings crowne, and to his royall dignity, there he ought to bee assoiled without making any satisfaction, for the spirituall Court exceedeth their power in that they hold plee in those cases, & the party if he will may thereupon have a Præmunire facias, aswell against the party that sued him, as against the Judge: and therefore in this case they ought in conscience to make absolution without any satisfaction, for they not onely offended the party in calling him to answer before them of such things as belong to the law of the realme, but also the King: for he by reason of such suits, may lese great advantages, by the reason of the writs originals, judicials, fines, amerciaments, and such other things as might grow to him if suits had bin taken in his courts according to his lawes: & according to this saying it appeareth in divers statutes, that if a man lay violent hands upon a clerk, & beat him, that for the beating amends shal be made in the kings court, & for the laying

of

of violent hands upon the Clerk, amends shall be made in the Court christian. And therefore if the Judge in the Court christian would award the party to yeeld damages for the beating, hee did against the statute. But admit that a man be excommenged for a thing that the spirituall Court may award the party to make satisfaction of, as for the not inclosing of the Churchyard, or for not apparelling of the Church conuenientlie: Then I think the party must make restitution, or lay a sufficient caution if he be able or he be assoiled: but if the party offer sufficient amends, and have his absolution, & the Judge will not make him his letters of absolution, if the excommengement be of Record in the Kings Court, then the King may write unto the spirituall Judge, commanding him that he make the party his Letters of absolution upon paine of contempt: and if the said excommunication be not of Record in the Kings Court, then the party may in such case have his action against the Judge spirituall, for that he would not make him his Letters of absolution: but if he be not assoiled, or if he be not able to make satisfaction, and therefore the Judge spirituall will not assoile him, what the Kings Lawes may doe in this case I am somewhat in doubt, & will not much speake of it at this time, but as I suppose, he may aswell have his action in that case for the not assoiling him as where he is assoiled, and that the Judge will not make him his Letters of absolution: and I suppose the same law to be where a man is accused for a thing that the Judge had no power to accuse

him

him in, as for Debt, Treſpaſſe or ſuch other. Do. There hee may have other remedies, as a Præmunire facias, or ſuch other, and therefore I ſuppoſe the other action lyeth not for him.

St. The Judge and the party may be dead, & then no Præmunire lyeth, and though they were alive, and were condemned in Præmunire, yet that ſhould not avoid the excommengement: and therefore I think the action lieth, ſpecially if he be thereby delayed of actions that he might have in the Kings Court, if the ſaid excommengement had not bin.

§ Whether a Prælat may refuſe a Legacie.

Cap. 33.

IT is moved in the ſaid ſum, named Roſella, in the title Alienatio 20 the 11. article, whether a prelate may refuſe a Legacie, wherein divers opinions bee recited there, which as mee thinketh have need after the laws of the Realm to be more plainly declared. D. I pray thee ſhew me what the law of the Realm will therein. St. I think that every Prelat and ſoveraign that may onely ſue, and bee ſued in his owne name, as Abbots, Priors, and ſuch other, may refuſe any legacy that is made to the houſe: for the legacy is not perfect till hee to whom it is made aſſent to take it, for elſe if he might not refuſe it, he might be compelled to have lands whereby he might in ſome caſe have great loſſe

but

but then if he intend to refuse, he must as soone as his title by the legacy falleth, relinquish to take the profits of the thing bequeathed, for if one take the profits thereof, he shal not after refuse the Legacy: but yet his successor may if he will refuse the taking of the profits to save the house from yeelding damages, or from arrerages of rents, if any such be: and like law is of remainder, as is in legacy, for though in the case of a remainder, and also of a devise, as most men say, the freehold is cast upon him by the law when the remainder or devise falleth: yet it is in his liberty to refuse the taking of the profits, & to refuse the remainder if he will as he might do of a gift of lands, or goods, for if a gift be made to a man that refuseth to take it, the gift is void, & if it be made to a man that is absent, the gift taketh no effect in him till hee assent: no more then if a man disseise one to another mans use, he to whose use the disseisin is made, hath nothing in the land, ne is no disseisor till he agree: And to such disseisins and gifts, an Abbot or Prior may disagree, aswel as any other man. But after some men a Bishop, of a devise, or remainder that is made to the Bishop, and to the Deane and Chapter, nor a Deane and a Chapter of a devise, or remainder made to them, as yet the Master of a colledge of such a devise, or remainder made to him and to his brethren, may not disagree without the Chapter or brethren: for the Bishop of such land as hee hath with the Deane and Chapter: ne the Deane nor master of such land as they have with the Chapter or brethren may not answer without

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the Chapter and brethren: and therefore some say that if the Deane or master will refuse, or disclaime in the lands that they have by the devise or remainder, that disclaimer without the chapter or brethren is void. And therefore it is holden in the law, that if a Bishop be vouched to warrant, and the tenant bindeth him to the warranty by reason of a lease made to him by the Bishop, and by the Deane and the Chapter, yeelding a rent, that in that case the Bishop may not disclaim in the reversion without the assent of the Deane and Chapter: but yet if a reversion were granted to a Deane and a Chapter, and the Deane refuse, the grant is void. And so it appeareth that the Deane may refuse to take a gift, or grant of lands, or goods, or of a reversion made to him and to the Chapter, and yet he may not disagree to a remainder, or devise, and the diversity is because the remainder and devise be cast upon him without any assent, whereupon neither the Dean or the Chapter by themselves, may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, and in such gifts, as I suppose, an Infant may disagree as well as one of full age, but if a woman covert disagree to a gift, and the husband agree, that gift is good. D. What if the lands in that case of a man and his wife be charged with damages, or be charged with more rent then the land is worth, and the husband dye, shall the wife be charged to the damages, or to the rent? &c. I thinke nay, if the wife refuse the occupation of the ground after her husbands death,

and

and I think the same law to be, if a lease be made to the husband and the wife, yeelding a greater rent then the land is worth, that the wife after the husbands death may refuse the Lease to save her from the payment of the rent, & so may the successor of an Abbot. D. And if the husband in that case overlive the wife, & then make his executors and die, whether may his executors in like wise refuse the lease? S. If they have goods sufficient of their testator to pay the rent, I thinke they may not refuse it: but if they have not goods sufficient of their testator to pay the rent to the end of the terme, I think if they relinquish the occupation, they may by speciall pleading discharge themselves of the rent & the lease, & if they doe not, they may lightly charge themselves of their owne goods. And if a lease be made for terme of life, the remainder to an Abbot for terme of life of I. at S. reserving a greater rent then the land is worth, & after the tenant for terme of life dieth, the Abbot may refuse the remainder for the cause before rehearsed: and in case that the Abbot assent to the remainder, whereby he is charged to the rent during the time that he is Abbot, and after he dyeth or is deposed, living the said I. at S. in that case his successor may discharge himselfe by refusing the occupation of the land, as is aforesaid. But I think that if such a remainder were made to a Deane, and to the Chapter, and the Deane agree without the assent of the Chapter, that in that case the Deane and the Chapter may afterwards disagree to the remainder, and that the act of the Deane with-

but the assent of the Chapter shall not charge the Chap. in that behalfe. And thus it appeareth, though the meaning of the said chap. & article in the said sum be, that a Prelate may not disagree unto a legacy, for hurting of a house, yet he may after the lawes of the Realm disagree thereto, where it should hurt his house. And if in a Præcipe quod reddat, there be but one tenant, be he spirituall or temporall, & he refuse by way of disclaimer, in such case where he may disclaim by the law, there the land shall vest in the demandant: & if there be 2 tenants, then it shall vest in his fellow, if he will take the whole tenancy upon him, or else it shall vest in the demandant. But if an Abbot or Layman refuse the taking of the profits, and shew a speciall cause why it should hurt him if he do assent, and bee thereby discharged as is said before: in whom the land shall then vest it is more doubt, whereof I will no farther speake at this time. And thus it appeareth by divers of the cases that be put in this chapter, that he that is ignorant in the law of the Realm, shall lack the true judgement of conscience in many cases. For in many of these cases that may be done therein by the law, must also be observed in conscience, &c.

§ Whether a gift made under a condition bee void if the soveraigne onely breake the question.

Cap. 34.

IN summa Rosella in the title Alienatio, the 12. article, is asked this question, whether a gift

made under a certaine forme may be avoided or revoked, because the Prelates or soveraigne onely did breake the forme, and it is there answered, that it may not, for that the deed of the Prelate onely ought not to hurt the Church: and if those words (under a manner) be understood of a gift upon condition as they seeme to bee, then the said solution holdeth not in this realme neither in law nor conscience. D. what is then the law of England if a man enfeoffe an Abbot by deed indented, upon condition, that if the Abbot pay not the Feoffor a certain summe of money at such a day, that then it shall be lawfull to the feoffor to re-enter, and at that day the Abbot faileth of his payment, may the Feoffor lawfully re-enter and put out the Abbot?

S. Yea verily, for he had no right to the land, but by the gift of the feoffor, and his gift was conditionall, and therefore if the condition be broken, it is lawfull by the law of England for the feoffor to re-enter, and to take his land again, & to hold it as in his first estate: by which re-entry after the lawes of the realme, he disproveth the first livery of seisin, and all the mesne acts done betweene the first feoffement and the re-entry: and it forceth little in the Law, in whom the default be that the condition was not performed; whether in the Abbot or in his covent, or in both, or in any other person whatsoever he be, except it be in the feoffor himselfe. And it is great diversity betweene a cleare gift made to an Abbot without condition, and where it is made with condition: for when it is made without

out condition, the act of the Abbot onely shall not by the common law disherit the house, but it be in very few cases: but yet upon divers statutes the sufferance of the Abbot onely may disherit the house, as by his ceasser, or by levying of a crosse upon a house against the statute thereof made, in which case the house thereby shall leese the land, and some say that by the common law upon his disclaimer in avowrie, a writ of right of disclaimer lyeth, but if the gift be upon condition, it standeth neither with law nor conscience, that the Abbot should have any more perfect or fuller estate then was given unto him: and therefore as the said estate was made to the house upon condition, so that estate may be avoided for not performing of the condition. And I think verily that this I have said is to be holden in this realme, both in the Laws and Conscience, and th all the decrees of the Church to the contrary, bind not in this case. But if the Lands be given to an Abbot, and to his Covent to the intent to find a lampe, or to give certain dimes to poore men, though the intent be not in those cases fulfilled, yet the feoffor, nor his heire may not re-enter: for her reserves no re-entry by expresse words, as in the words, when he said, to the intent to find a lampe, or to give dimes, &c. is implyed no re-entry, ne the feoffor, nor his heires shall have no remedy in such cases, unlesse it bee within the case of the statute de Westminst. the second, that goeth the Cessavit de Tenuris.

§ Whether a covenant made upon a gift to the Church, that it shall not bee alienes, bee good.

Cap. 35.

IN the said summe, called summa Rosella, the said title Alienatio, the 13. article, is asked this question, whether a covenant made upon a gift to the Church, that it shall not be alienes, be good. And the same question is moved again in the said summa called Rosella, in the title Conditio the first article, and in summa Angelica, in the title Donatio prima, the 51. & 52. articles, & th' intent of the question there is, whether notwithstanding that the condition be good to some alienations, whether that yet it be good to restraine alienations for the redemption of them that be in captivity under the Infidels, or for the greater advantage of the houses: though the better opinion be there, that the condition may not be broken for redemption of them that be in captivity, yet it is in maner a whole opinion that it may be sold for the greater advantage to the house: for it is said there that it may not be taken, but that the intent of the giver was so, and therefore they call the condition that prohibiteth it to be sold, conditio turpis, that is to say, a vile condition, wherefore they regard it not: but verily as I take it, if a condition may restraine any maner of alienations, then it shall as well restraine Alienation for the two causes before rehearsed, as for any other causes: although me thinketh that the condition is good, o

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after the lawes of the Realme, that upon gifts to the Church restraineth alienations, yet I shall touch one reason that is made to the contrary, that is this; there is a cleere ground in the law, that if a feoffement be made to a common person in fee, upon condition that the feoffee shall not alien to no man, that condition is void, because it is contrary to the estate of a fee simple, to bind him that hath the estate, that hee should not alien if he list: and some say that an Abbot that hath land to him and to his successors, hath as high and as perfect a fee simple as hath a Lay-man that hath land to him and to his heires, and therefore they say, that it is as well against the Law of the Realme to prohibit that the Abbot shall not alien, as it is to prohibit a Lay-man thereof: and though it be therein true as they say, as to the highnesse of the estate, yet me thinketh there is a great diversity betweene the cases concerning their alienations: for when lands be given in fee simple to a common person, the intent of the Law is that the feoffee shall have power to alien, and if he do alien, it is not against the intent of the law, ne yet against the intent of the feoffor: but when lands be given to an Abbot and to his successors, the intent of the law is, and also of the giver (as it is to presume) that it should remaine in the house for ever: and therefore it is called Mortmain, that is to say, a dead hand, as who saith that it shall abide there alway as a thing dead to the house. And therefore as I suppose the law will suffer that condition to be good, that is made to restraine that such Mort-

main should not be alienedy, and that yet it may prohibite the same condition to be made upon a feoffement made in fee simple to a man and to his heires: for that is the most high, the most free, and the most pure estate that is in the law. But the Law suffereth such a condition to be made upon a gift in taile, because the Statute prohibiteth that no alienation should be made thereof. And then, as the Law suffereth such a condition upon gift in Mortmain, that is to say, that it shall not be alienedy, to be good: then it judgeth the condition also according to the words, that is to say, if the condition bee generall that they shall alien to no man, as this case is, that it shall be taken generally according to the words, & it shall not be taken, that the intent of the giver was otherwise then hee expressed in his gift: though percase if hee were alive himselfe, and the question were asked him whether he would be contented it should be alienedy for the said two casesy or not, hee would say yea, but when he is dead no man hath authority to interpret his gift otherwise then the Law suffereth, nor otherwise then the words of the gift be. And if the condition be speciall, that is to say, that the land shall not be alienedy to such a man, or such a man, then the conditions shall be taken according to the words, and then they may be alienedy as for that condition to any other, but to them to whom it is expressly prohibited that the land should not bee alienedy to. And if the Lands in that case be alienedy to one that is not excepted in the condition, then he may alien the land to him that is first excepted with-

without breaking of the condition, for conditions be taken strictly in the law and without equity. And thus me thinketh, that because the said condition is generall, and restraineth all alienations, that it may not bee alienes neither by the law of the Realme, ne yet by conscience, no more for the said two causes, then it may for any other cause: and this case must of necessity bee judged after the rules and grounds of the Law of the Realme, and after no other Law as me seemeth.

§ If the Patron present not within 6. months, who shall present.

Chap. 36.

IN the same sum, called Summa Rosella, in the title Beneficium, in principio, it is asked, If the Patron present not within six months, who shall present, and within what time the presentment must be made? And it is answered there, that if the Patron present not within six months, that the Chapter shall have six months to present, and if the Chapter present not within six months, that then the Bishop shall have other six months: and if he be negligent, then the Metropolitan shall have other six months, and if he present not, then the presentment is devolt to the Patriark: And if the Metropolitan have no superiour under the Pope, then the presentment is devolt to the

Pope. And so, as it is said there, the Archbishop shall supply the negligence of the Bishop, if he be not exempt, and if he be exempt, the presentment immediately shall fall upon the Bishop, to the Pope. And as I suppose these diversities hold not in the Lawes of the Realm. Do. Then I pray thee shew me who shall present by the Lawes of the Realm, if the Patron do not present within 6. monthes? Stu. Then for default of the Patron the Bishop shall present, unless the King be Patron, and if the Bishop present not within six months, then the Metropolitan shall present, whether the Bishop be exempt or not. And if the Metropolitan present not within the time limited by the Law, then there be divers opinions who shall present, for some say the Pope shall present, as it is said before, and some say the King shall present.

D. What reason make they that say the King should present in that case? St. This is their reason, they say that the King is Patron paramount of all the benefices within the Realme. And they say farther, that the King and his progenitors Kings of England, without time of minde, have had authority to determine the right of Patronages in this Realme in their owne Courts, and are bound to see their Subjects have right in that behalfe within the Realme, and that in that case from him lyeth no appeale. And then they say, that if the Pope in this case should present, that then the King should not onely lese his Patronage paramount, but also that he should not sometime be able to doe right to his Subjects.

D. In

D. In what case were that? S. It is in this case: The Law of the Realme is, that if a benefice fall void, then the Patron shall present within 6. months, and if he do not, that then the Ordinary shall present, but yet the Law is farther in this case, that if the Patron present before the Ordinary put in his Clerke, that then the Patron of right shall enjoy his presentment, and so it is, though the time should fall after to the Metropolitan, or to the Pope, and if the presentment should fall to the Pope, then though the Avoydson abode still void, so that the Patron might of right present, yet the Patron should not know to whom hee should present, unlesse hee should goe to the Pope, and so hee should faile of right within the Realme. And if percase hee went to the Pope, and presented an able Clerke unto him; and yet his Clerk were refused and another put in at the collation of the Pope, or at the presentment of a stranger, yet the Patron could have no remedy for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the law will suffer no Title in this case to fall to the Pope. And they say, that for a like reason it is, that the Law of the Realme will not allow an excommunengement that is certified into the Kings Court under the Popes Bulls: For if the party offered sufficient amends, and yet could not obtaine his letters of absolution, the King should not know to whom to write for the letters of Absolution, and the party should not have right, and that the Law will in no

wise suffer. Doct. The Patron in that case may present to the Ordinary as long as the Church is void, and if the Ordinary accept him not, the Patron may have his remedy against him within this Realm. But if the Pope will put in an Incumbent before the Patron present, it is reason that he have the presentment, as me seemeth, before the King. 5. when the Ordinary hath surceased his time, hee hath lost his power as to that presentment, specially if the collation bee devolt to the Pope. And also when the presentment is in the Metropolitan he shall put in the Clerk himselfe, and not the Ordinary: and so there is no default in the Ordinary, though he present not the Clerk of the Patron, if his time be past, and so there is no remedy against him for the Patron.

D. Though the Incumbent abide still out of the realm, yet may a Quare Impedit lye against him within the Realm: and if the Incumbent make default upon the distresse, and appear not to shew his title, then the Patron shall have a writ to the Bishop according to the Statute, and so he is not without remedy.

S. But in this case he cannot be summoned, attached, nor distrained, within the Realm.

D. He may be summoned by the Church, as the tenant may in a writ of right of Advowson.

S. There the advowson is in demand, and here the presentment is onely in debate: and so he cannot bee summoned by the Church here no more then if it were in a writ of Annuity, and there the common returne is, quod Clericus ad beneficium, non habens laicum feodi ubi potest sum-

summoned. And though he might bee summoned in the Church, yet he might neither be attached nor distrained there, and so the Patron should be without remedy. D. And if he were without remedy, he should yet be in as good case as he should be if the King should present: for if the title should be given to the King, the Patron had lost his presentment clearly for the time, though the Church abide still void. For I have heard say that in such presentments right after the Law of the Realme runneth unto the King. S. That is true, but there the presentment should be taken from him by right and by the Law, and here it should bee taken from him against the Law, and there as the Law could not help him, and that the Law will not suffer. D. Yet me thinketh alway that the title of the Laps in such case is given by the Law of the Church, & not by the temporall law, and therefore it forceth but litle what the temporall law will in it, as mee seemeth. S. In such countries where the Pope hath power to determine the right of temporall things, I think it is as thou saist, but in this Realm it is not so. And the right of presentment is a temporall thing, and a temporal inheritance, & therefore I think it belongeth to the Kings law to determin, & also to make Laws who shall present after 6. months as well as before; so that the title of examination of ability or non-ability bee not thereby taken from the Ordinary. And in this case it is of avoidance of benefices, that is to say, then is shall be judged by the Kings Laws whether shall be said void, and when not,

and not by the law of the Church, as when a parson is made a Bishop, or accepteth another benefice without a Licence, or resigneth, or is deprived, in these cases the common law saith that the benefice is void, and so they should be though a law were made by the Church to the contrary: and so if the Pope should have any title in this case to present, it should be by the Law of the Realme. And I have not seen nor heard that the Law of the Realme hath given any title to the Pope to determine any temporall thing that may be lawfully determined in the Kings Court. D. It seemeth by that reason that thou hast made now, that thou preferrest the Kings authority in presentments before the Popes, & that me thinketh should not stand with the law of God, sith the Pope is the Vicar generall under God. Stu. That I have said proveth not, that for the highest preheminent in presentments he is to have authority to examine the ability of the Parson that is presented: for if the presentee be able, it sufficeth to the discharge of the Ordinary, by whomsoever he be presented, and that authority is not denied by the law of the Realme to belong alway to the spirituall jurisdiction: but my meaning is, that as to the right of presentments, and to determine who ought to present, and who not, and at what time, and when the Church shall be judged to be void, and when not, belong to the King and to his laws: for else it were a thing in vaine for him to hold plee of Advowsons, or to determine the right of patronage in his temporall courts, and not to have authority to determine

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the right thereof, and those claimes seemeth not to be against the Law of God. And so me seemeth in this case the presentment is given the King. D. And if the King should have right to present, then might the Church happen to continue void long ever, for as we have said before, no time runneth to the King in such presentment. St. If any such case happen, if the King present not, then may the Ordinary set in a deputy to serve the cure, as he may do when negligence is in other Patrons that may present and do not: and also it cannot be thought that the King which hath the rule and governance over the people, not onely of their bodies, but also of their souls, will hurt his conscience, and suffer benefice continually to stand without a Curate, no more then he doth in Advowsons that be of his owne presentment.

§ Whether the presentment and collation of benefices and dignities, holding at Rome, belongeth onely to the Pope.

Cap. 37.

IN the same sum, called Summa Rosella, in the title Beneficium primum, in the 13. article, It is said that benefices, dignities, and parsonages, holding in the court of Rome, may not be given us by the Pope and likewise of the Popes servants, and of other that come and go from the Court, if they die in places nigh to the Court within two dayes journey, all these belong to the Pope: but if the Pope present not with-

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in a month, then after the month they to whom it belongeth to present, may present by themselves onely, or by their vicar generall if they in far parts: and these sayings hold not in the law of the Realme. Do. what is the cause that they hold not in this Realme, as well as in all other Realmes? Ans. One cause is this: The King in this Realme according to the ancient right of his Crown, of all his advowsons that be of the Patronage ought to present. And in like wise other Patrons of benefices of their presentment, and the pleas of the right of presentment of benefices within this Realme, belong to the King and his Crown. And these titles cannot bee taken from the King and his subjects, but by their assent, and the law that is made therein to put away the title, bindeth not in this Realme. And over that, before the statute of 25. E. 3. there was a great inconvenience and mischiefe, by reason of divers provisions and reservations, that the Pope made to the benefices of this Realme, contrary to the old right of the King and other Patrons of this Realme, as well to the Archbishopricks, Bishopricks, Deanries and Abbies, as to other dignities and benefices of the Church: And many times aliens thereby had benefices within the Realme that understood not the English tongue, so that they could not counsell ne comfort the people when need required, and by that occasion great riches were conveyed out of the Realm: wherefore to avoid such inconvenience, it was ordained by the said statute, that all Patrons as well spirituall as temporall should have the presentments

ments freely: & in case the collation or provision were made by the Pope in disturbance of any Spirituall Patron, that then for that time the King should have the presentment, & if it were in disturbance of any lay Patron, that then if the Patron presented not within the halfe yeare after such voidance, nor the Bishop of the place within a month after the halfe yeare: that then the King should have also the presentment, and that the King should have the profits of the benefices so occupied by provision, except Abbies and Priories, & other houses that have colledge and covent, & there the colledge & covent to have the profits: and because the statute is generall, and excepteth no such benefices as shall void in the Court of Rome, or in such other place as before appeareth, therefore they be taken to be within the provision of the said statute as well as the benefices that void within the Realme: and all provisors & executors of the said collations & provisions, & all their attornies, notaries, maintainers, shall be out of the protection of the King, & shall have like punishment as they should have for executing of benefices voiding within the Realm. D. But I cannot see how the said statute may stand with conscience, that so farre restrained the Pope of his liberty, which as me seemeth hee ought in this case of right to have. Sr. Because (as I suppose) that Patrons ought of right to have their presentments, under such manner as they claime them in this Realm, as I have said before, and as in the 26. chapter of this book appeareth more at large: and also forasmuch as it appeareth evidently,

that

that great inconvenience followed upon the said prohibitions, and that the said statutes were made to avoid the same, which vse hath been suffered by the Pope, and hath been alway vsed in this realme without resistants, that the said statute should therefore stand with good conscience.

§ If a house by chance fall upon a horse that is borrowed, who shall beare the losse?

Cap. 38.

IN the said summe called Summa Roselli, in the title Casus fortuitus, in the beginning is put this case. If a man lend another a horse, which is called there Depositum, and a house by chance falleth upon the horse, whether in this case he shall answer for the horse? And it is answered there, that if the house were like to fall, that then it cannot be taken as a chance, but as the default of him that had the horse delivered to him: But if the house were strong, and of likelyhood and by common presumption in no danger of falling, but that it fell by sodaine tempest, or such other casualty, that then it shall be taken as a chance, and he that had the keeping of the horse shall be discharged: though this diversity agreeth with the Lawes of the Realme, yet for the more plainer declaration thereof, and for the more like cases and chances that may happen to goods, that a man hath in

in his keeping that be not his owne. I shall adde a little more thereto, that shalbe somwhat necessary as mee thinketh to the ordering of conscience. First a man may have of another by way of lone or borrowing, money, corne, wine, and such other things, where the same thing cannot be delivered if it be occupied, but another thing of like nature and like value must be delivered in it, & such things he that they be lent to, may by force of the lone use as his owne. And therefore if they perish, it is at his ieopardy, & this is most properly called a lone. Also a man may lend to another a horse, an ore, a cart, or such other things that may be delivered againe, and they by force of that lone may be used and occupied reasonably in such manner as they were borrowed for, or as it was agreed in the time of the lone that they should be occupied, & if such things be occupied otherwise then according to the intent of the lone, & in that occupation they perish, in what wise soever they perish, so it be not in default of the owner, he that borrowed them shalbe charged therewith in law & conscience: & if he that borrowed them occupy them in such manner as they were lent for, & in that occupation they perish in default of him that they were lent to, then he shall answer for them: and if they perish not through his default, then he that ownith them shall beare the losse. Also if a man have goods to keepe to a certain day, for a certaine recompence for the keeping, hee shall stand charged or not charged, after as default or not default shall bee in him as before appeareth, and so it is if hee have nothing

for the keeping, but if hee have for the keeping, & make a promise for the time of the delivery to deliver them safe at his perill, then he shall be charged with all chances that may fall. But if hee make that promise & have nothing for keeping, I think he is bound to no such casualties, but that he be wilfull & his owne default, for this is a bare, or a naked promise, whereupon as I suppose no action lyeth. Also if a man find goods of another, if they be after hurt or lost by wilfull negligence, he shal be charged to the owner, but if they be lost by other casualtyes as if they be layed in a house that by chance is burned, or if he deliver them to another to keepe that runneth away with them, I think he be discharged: and these diversities hold most commonly upon pledges, or where a man hireth goods of his neighbor to a certain day for certain money: and many other diversities bee in the law of the Realm, what shall be to the jeopardy of the one, & what of the other, which I will not speak of at this time: And by it may appeare that it is commonly holden in the lawes of England if a common carrier go by the waies that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed, or if he overcharge his horse, whereby he falleth into the water, or otherwise, so that the stuff is hurt or spoiled: that he shall stand charged for his misdemeanour, and if he would precisely refuse to carry it, unlesse promise were made unto him that he shall not be charged for no misdemeanour that should be in him, the promise were void: for it were against reason & against good manners

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and so it is in all other cases like. And all these liberalities be granted by secondary conclusions derived upon the Law of reason, without any statute made in that behalfe. And peradventure laws, and the conclusions therein, be the more plain & the more open. For if any statute were made therein, I think verily no doubts & questions would rise upon the Statute, then doth now when they be onely argued & judged after the common law.

§ If a Priest have won much goods by saying of Masse, whether he may give those goods or make a will of them.

Chap. 39.

In the said sum called Summa Rosella in the title Clericus quartus the third article, is also this question: If a priest have won much goods by saying of masse, whether he may give those goods, or make a will of them? whereto it is answered there, that he may give them, or make a will of them, specially when a man bequeths money for to have Masses said for him: & the like law is of such things as a Clerk winneth by the reason of an office: For it is said there, that such things came to him by reason of his own person: which sayings I think accord with the law of the realm. But forasmuch as in the said article and in divers other places of the said chapter, and in divers other chapters of the said Summe, is put great diversity between such goods, as a Clerk hath by reason of his

Church, and such goods as he hath by reason of his person, and that he must dispose such goods as he hath by reason of his church in such manner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods that com by reason of his own person, therefore I shall a little touch what spirituall men may doe with their goods after the law of the Realme.

First, a Bishop, of such goods as he hath with the Deane and Chapter, hee may neither make gift nor bequest, but of such goods as he hath of his own by reason of his Church, or of the gift of his ancestors or of any other, or of his patrimony, he may both make gifts and bequests lawfully. And an Abbot of the goods of his Church may make a gift, and that gift is good as to the Law: But what it is in conscience, that is after the cause and intent and quality of the gift, for if it be so much that it notably harteth the house or the covent, or if he give away the bookes, or the chalices, or such other things as belong to the service of God, he offendeth in conscience, and yet he is not punishable in the Law, ne yet by Subpœna after some men, ne in none otherwise but by the Law of the Church as a waster of the goods of his monastery. But nevertheless I will not fully hold that opinion, as to that that belongeth necessarily to the service of God, whether any remedy lye again him or not, but remit it to the judgement of other. And of a Deane and Chapter, and a Master & brethren of goods that they have to themselves, & also of goods that they have with

the Chapter & brethren, the same diversity holdeth, as appeareth before of a Bishop and the Deane and Chapter, except that in a case of a Master & brethren the goods shall be ordered as shalbe assigned by the foundation. And moreover, of a Person of a Church, Vicar and Chantry Priest, or such other, all such goods as they have, aswell such as they have by reason of the Parsonage, Vicarage, or Chantry, as that they have by reason of their owne person, they may lawfully give and bequeath where they will after the common law: And if they dispose part among the parishioners, and part to the building of Churches, or give part to the Ordinary, or to poore men, or in such other manner, as it is appointed by the law of the Church, they offend not therein, unlesse they think themselves bounden thereto by duty, & by authority of the Law of the Church, not regarding the Kings Lawes, for if they do so, it seemeth they resist the Ordinances of God, which hath given power to Princes to make lawes: but there as the Pope hath soveraignty in temporall things, as he hath in spirituall things, there some say that the goods of Priests must in conscience be disposed as is contained in the said Summe, but that holdeth not in this Realme: for the goods of spirituall men be temporall in what manner soever they come to them, & must be ordered after the temporall law as the goods of the temporall man must be. Howbeit if there were a Statute made in this case of like effect in many points, as the law of the Church is, I think it were a right good and a profitable Statute.

§ Who shall succeed a Clerk that dyeth intestate.

Cap. 40.

In the said sum called Rosella in the Chapter Clericus quartus the 7. Article, is asked this question, who shall succeed to a Clerke that dieth intestat; and it is answered, that in goods gotten by reason of the Church, the Church shall succeed. But in other goods his kinsmen shall succeed after the order of the law, and if there be no kinsman, then the Church shall succeed. And it is said further, that goods gotten by a Canon secular by reason of his Church or prebend shall not goe to his successor in the prebend, but to the Chapter. But where one that is benefited is not of the congregation, but he hath a benefice clearely separate, as if he be a Parson of a parish Church, &c. is a president, or an Archdeacon not benefited by the Chapter, then the goods gotten by reason of his benefice, shall goe to his successor, & not to the Chapter, and none of these sayings hold place in the laws of England. Q. What is then the Law if a Parson of a Church, or a Vicar in the Country dye intestate, or if a Canon secular be also a Parson, and have goods by reason thereof, and also by a Prebend that he hath in a Cathedral Church, & he dye intestate, who shall have his goods? &c. At the common Law the Ordinary in all these cases may administer the goods, and after he must compte administration to the next

next faithfull friends of him that is dead intestate that will desire it, as he is bound to doe where lay-men that have goods dig intestate. And if no man desire to have administration, then the Ordinary may administer, and see the debts payed, and hee must beware that he pay the debts in such order as is appointed in the common Law: for if he pay debts upon simple contracts before an Obligation, he shall be compelled to pay the debt upon the Obligation of his owne goods, if there be no goods sufficient of him that died intestat, and though it be otherwise in such case that the Ordinary may pay pound and pound like, that is, to apportion the goods among the debtors after his discretion, yet by the rigor of the common Law, he might be charged to him that can first have his judgement against him. And furthermore by that is said afore in the last Chapter it appeareth that a Bishop that hath goods of his patrimony, or a Master of a College, or a Dean of goods that they have of their owne only to themselves dye intestate, that the Ordinary shall commit administration thereof, as before appeareth, and if they make Executors, then the executors shall have the ministration thereof: But the heires nor the kinsmen by that reason only that they be heires or of kin to him that is deceased, shall have no medling with his goods, except it be by custome of some countries where the heires shall have their lands, as where the children (the debts and legacies paied) shall have a reasonable part of the goods after the custome of the country.

§ If a man be outlawed of felony, or be attainted for murder or felony, or that is an Asciſmus, may be ſlaine by every ſtranger.

Cap. 41.

IT appeareth in this ſaid ſum called Summa Angelica in the 21. Chap. in the title of Asciſmus the 2. Paragrafe, that hee is an Asciſmus that will ſlay men for money at the inſtance of every man that will move him to it, and ſuch a man may lawfully be ſlaine, not onely by the Judge, but by every private perſon. But it is ſaid there in the 4. paragrafe, that he muſt firſt be judged by the law as an Asciſmus ere he may be ſlaine, or his goods ſeiſed. And it is ſaid further there in the 2. paragrafe, that alſo in conſcience ſuch an Asciſmus may be ſlaine if it be done through a zeale of juſtice, and elſe not. Is not the Law of the realme likewiſe of men outlawed, abiured, or judged for felony?

Ans. In the law of the realme there is no ſuch Law that a man ſhall bee judged as an Asciſmus, ne if a man be in full purpoſe for a certaine ſumme of money that he hath received, to ſlay a man, yet it is no felony, ne murder in the law till he hath done the act: for intent of felony nor murder is not puniſhable by the common Law of the Realme, though it be deadly ſinne before God, but in Treaſon or in ſome other particular caſes by ſtatute that intent may bee puniſhed. And though a man in ſuch a caſe kill a man for money: yet it ſhall not be admitted that he

hee is an Ascismus. For as it is said before, there is no such terme of Ascismus in the Law of the Realm, but he shall in such case be arraigned upon the murther. And if he confesse it or plead that he is not guilty, & is found guilty by xii. men, he shall have judgement of life, and of member, and shall forfeit his lands and goods. And like law is of an Appeale brought of the murder, if hee stand dumbe and will not answer to the murder, hee shall bee attainted of the murder, and shall forfeit life, lands & goods. But if he be arraigned of the murder upon an Indictment at the Kings suit, and thereupon standeth dumbe and will not answer, there he shall not be attainted of the murder, but he shall have paine fort and dure, that is to say, he shall be prested to death, and he shall there forfeit his goods, and not his lands. But in none of these cases (that is to say) though a man bee Outlawed for murder or felony, or be abjured, or that he be otherwise attainted: yet it is not lawfull for any man to murther him, or slay him, ne to put him in execution but by authority of the Kings Laws. Insomuch that if a man be adiudged to have paine fort and dure, and the Officer beheadeth him, or on the contrariwise putteth him to paine fort and dure, where he should behead him, he offendeth the law. And if an Officer which hath authority to put a man to death, may not put him to death but according to the judgement, then me thinketh it should follow more stronger that a stranger may not put such a man to death of his owne authority without commandement

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of the Law. But if the judgement be that he shall be hanged in chaines, & the officer hangeth him in other things and not in chaines, I suppose he is not guilty of his death: But some say he shall there make a fine to the King, because he hath not followed the words of the judgement.

Also if a man that is no officer would arrest a man that is outlawed, abjured, or attainted of murder or felony, as is aforesaid, and he disobeyeth the arrest, & by reason of the disobedience he is slaine, I suppose the other shall not be impeached for his death: for it is lawfull unto every man to take such persons & bring them forth that they may be ordred according to the law. But if a Capias be directed unto the Sherife to take a man in an action of debt or trespasse, there no man may take the man, but hee have authority from the Sherifee: and if any man attempt of his own authority to take him, & he resisteth, & in the resisting is slaine, he that would have taken him is guilty of his death.

§ Whether a man shall bee bounden by the act or offence of his servant or officer.

Cap. 42.

Wood. fol. 54

IN the said summe called Summa Angelica, in the title Dominus, iiij. Paragrafe, is asked this question, whether a man shall bee charged for his houshold: and it is said there that he shall when the houshold offendeth in an office or ministery

misery that the Master is the chiefe officer of, and he hath the wood and the profit of the household: For it shall be his default that he would chuse such servants, for hee ought to appoint honest persons: But it is said there, that it is to be understood civilly, & not criminally, wherby, as is said there, he that is a governour is bound for the offence of his officers, and that the same is to be holden of a Captaine, that he shall be bound for the offence of his squires, and an host for his guest, and such other. Nevertheless it is said there, that certain Doctors, there rehearsed, said thereto, that if the office be an open or publike office, as an office of power, or other like, It sufficeth to bring forth him that offended: But it is otherwise if it be not a publike office, but an host or a Taverner, or other like. But if the household offend not in the office the Lord is not bound as to the Law, but in conscience he is bound if he were in default by not correcting them, for he is bound to correct them both by word and example, and if he find any incorrigible, he is bound to put him away except that hee have presumptions, that if hee doe so, he will be the worse, and then he may doe that he thinketh best, as he is excused, and else not: For to such persons it is said, Error qui non resistitur, approbatur: (that is to say) an Error that is not resisted, is approved. Notwithstanding divers of the sayings before rehearsed agree with the Law of the Realme, yet all doe not so, and also they that doe are to be observed by authority of the Law of the realm and not by the authority alledged in the said Booke.

And therefore I intend to treat somwhat where the Master shall be charged by his servant, or deputy, or by them that be under him in any office, and where not, and then I intend to touch some other things, where the Master after the Lawe of the Realme shall be charged by the act of his servant in other cases not concerning offices, and where not.

First, if a man be committed to ward upon arrerages of accompt, and the keeper of the prison suffereth him to goe at large, then an action of debt shall lye against him. And if he be not sufficient, then it lyeth against him that committed the keeping of the prison unto him, and that is by reason of the statute of West. the 2. ca. 11. Also if Bailifes of Franchises that have Returne of Writs make a false returne, the party shall have averrement against it, aswell of too little issues as of other things, aswell as he shall have against the Sherife, but al the punishment shall be only upon the Bailife, & not upon the Lord of the Franchise, and that doth appeare by the statute made in the first yeare of King Ed. 3. the 1. chapter. But if an undersherife make a returne whereupon the Sherife shall be amerced, there the high Sherife shall be amerced, for the returne is made expresly in his name. But if it be a false returne whereupon an action of disceit lyeth, in that case it may bee brought against the undersherife. And see thereof the statute that is called Statutum de male returnantibus brevia.

Also if the Kings Butler make deputies, he shall answer for his deputies as for himselfe,

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as appeareth in the statute made in the 21. yere of King Edward the 3. De proditionibus the 21. Chapter.

Also, in the statute that is called Statutum Scaccarii, it is enacted among other things, that no officer of the Exchequer shall put any clerk under him, but such as he will answer for. And forasmuch as the statute is generall, it seemeth that he shall answer as well for an untruth in any such clerk as for an overlight.

Also in the 14. yeere of King E. the 3. c. 9. it is enacted, that all gailers shall bee appointed again to the Sherifes, and that the Sherife shall have the keeping of them, and that the Sherife shall make such undergardeins for the which they will answer. And nevertheleſſe I suppose that if there be an escape by default of the gailer, that the King may charge the Gailer if hee will. But it is no doubt but he may charge the Sherife by reason of this statute if he will. But if it bee a wilfull escape in the Gailer which is felony in him, the Sherife shall not be bound to answer to the felony, ne none other but the Gailer himselfe, and they that assented to him.

Also if a man have a Sherifewicke, Constableship, or Bayliwicke in fee, whereby he hath the keeping of prisoners, if hee let any to replevin that hee not replevishable, and thereof be attaint, hee shall leese the office &c. And if it bee an Undersherife, Constable, or Baylife, that hath the keeping of the prison, that doth it without knowledge of the Lord, hee shall have imprisonment by three yeares, and after shall be ransomed at the Kings will, as appeareth

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in the statute of West. the 1. the 15. chap. And so it appeareth, that in this case, he that is the Lord of the prison, is not bound to answer for the offence of them that have the rule of the prison under him, but that they shall have the punishment themselves for their misdemeanor. Also there is a statute made in the 27. yeare of King Ed. 3. the 19. Chap. that is called the statute of the Staple, whereby it is ordained, that no Merchant, ne none other man shall not lese their goods for the Treason, or forfeit of their servants, unlesse it be by commandement of his Master or that he offend in the office that his Master hath put him in, or else, that the Master shall be bound to answer for the deed of his servant by the law Merchant, as in some place it is used.

Also, it is enacted in the 14. yeare of King Edward the 3. the 8. Chapter, that Wapentakes and Hundreds that be severed from the Counties shall be adjoined againe unto them, and that if the Sheriffe hold them in his owne hands, that he shall put in them such Bailifes that have lands sufficient, and those for which hee will answer, and that if he let them to ferme, that they be lent to the ancient ferme: but after it is prohibited by the Statute of the 22. yeare of King Henry the 6. the 10. Chapter That no Sheriffe shall let his Bailiwicks, nor Wapentakes to ferme. And when they be once in the Sheriffes owne hands, and the Sheriffe put in Bayliffes, they be but as Underbayliffes to the King, and the Sheriffe the high bayliffe, & they in manner the Sheriffes servants & put in

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onely by him: And therefore by the said stat. of King Ed. the 3. he shall answer for them, if they offend in their office, but if the Sheriffe let them to ferm, then though the Sheriffe offend the statute in that doing, yet whether he shall be charged for their misdemeanor in the office or not, is a great doubt in some men, for they say that this statute is onely to be understood where the bayliwicks be in the Sheriffes hands, but here they be not so, ne the baylifes be not his servants, but his fermours: And therefore they say, that if the Sherife shall be charged for them, it is by the common Law, and not by the statute aforesaid. Also in the 2. yeare of King Henry the first the 14. Chap. it is enacted, that Officers by patent in every Court of the King, that by vertue of their Office have power to make clerks in the said courts, shall be charged and sworn to make such clerks under them, for whom they will answer. Also the Hospitelers and Templers be prohibit they shall hold no plee that belongs to the Kings Courts, upon pain to yeeld damages to the party grieved, & to make ransome to the King: that the superiours shall answer for their obediencers, as for their owne deed. Welt. 2. cap. 47. Also the Serjeant of the Eatery shall satisfie all the debt, damages, and executions that shall be recovered against any that is purveior, or achator, under him that offend against the Statute of prvi. of Ed. the iii. or against the Statute of xxiii. of Henry the vi. in case the purveiour, or achatour bee not sufficient &c. And the party plaintife shall have a Scire facias against the said ser-

ſergeant in this caſe to have execution, as appeareth in the 24. yeare of King Henry the vi. the 1. chapter.

Alſo if a man bee ſent to priſon upon a Statute marchant by the Maior, before whom the recognizance was taken, & the Gaoler will not receive him, he ſhall anſwer for the debt if hee have wherewith, & if not, then he ſhall anſwer that committed the Gaole to him, as appeareth in the ſtatute called the Statute marchant.

And if Outragious toile be taken in the towne Marchant, if it be the Kings town let to farme, the King ſhall take the franchiſe of the Market into his hands: And if it be done by the Lord of the Towne, the King ſhall doe in like wiſe: And if it be done by the Bailife, unknowing to the Lord, hee ſhall yeeld againe as much as he hath taken, and ſhall have impriſonment of 40. dayes: And ſo it appeareth that the Lord in this caſe ſhall not anſwer for his Bailife, Weſt. the 1. chap. 30. And in all the caſes before rehearſed, where the ſuperior is charged by the default of him that is under him, hee in whoſe default his ſuperior is ſo charged, is bound in conſcience to reſtore him that is ſo charged through his default; except the caſe before rehearſed of the Hoſpitlers, for all that the obediencer hath, is the ſuperiors if he will take it. And therefore what recompence ſhall be made by the obediencer in that caſe, is all at the will of the ſuperiour. And now I intend to ſhew ther ſome particular caſes, where the maſter after the laws of the realm ſhall be charged by the act of his ſervant, Bailiff, or deputy, & where

where not, and so for to make an end of this Chapter.

First, for trespasse of battery, or wrongfull entrie into lands or tenements, no yet for Felony or murder, the master shall not be charged for his servant, unlesse hee did it by his commandement.

Also if a servant borrow money in his Masters name, the Master shall not bee charged with it, unlesse it come to his use, & that by his assent. And the same law is if a servant make a contract in his masters name, the contract shall not bind his master, unlesse it were by his masters commandement, or that it came to the Masters use by his assent. But if a man send his servant to a fayre or market to buy for him certaine things, though he command him not to buy them of no man in certaine, and the servant doth according, the Master shalbe charged, but if the servant in that case buy them in his owne name, not speaking of his Master, the Master shall not be charged, unlesse the things bought come to his use.

Also if a man send his servant to the market with a thing which he knoweth to be defective to be sold to a certaine man, and he selleth it to him, there an action lyeth against the Master: but if the Master bringeth him not sell it to any person in certaine, but generally to whom he can, and he selleth it according, there lyeth no action of deceit against the Master.

Also if the servant keepe the Masters fire negligently, whereby his masters howses burnt and his neighbours also, there an action lyeth

against the Master. But if the servant beare fire negligently in the street, and thereby the house of another is burned, there lyeth no action against the Master.

Also, if a man desire to lodge with one, that is no common Hostelar, and one that is servant to him that he lodgeth with, robbeth his chamber, his master shall not be charged for the robbing: but if he had been a common Hostelar he should have been charged.

Also, if a man be gardein of a prison, wherein is a man that is condemned in a certaine summe of money, and another that is in prison for felony, and a servant of the gardein that hath the rule of the prison under him, wilfully letteth them both escape: in this case the gardein shall answer for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the servant onely shall be put to answer to the felony, for the wilfull escape.

Also if a man make another his generall receivour, and that receivour receiveth money of a creditour of his Master, and maketh him acquittance, and after payeth not his Master, yet that payment discharged the creditour: but if the creditour had taken an acquittance of him without paying him his money, that acquittance onely were no barre to the Master, unlesse he made him receivor by writing, and gave him authority to make acquittances, and then the authority must be shewed. And if the creditour in such case by agreement betweene the receivour and him, delivered to the rece-

receivour a horse or another thing in recompence of the debt, that delivery dischargeth not the creditour, unlesse it be delivered over unto the Master, and he agree to it. For the receivour hath no such power to make no such compensation, but his master give him speciall commandement thereto.

Also, if a servant owe a Creditour of his master, that his master sent him for his mony, and he payeth it unto him, that payment dischargeth him not, if the master bid not send him for it indeed, except that it came after unto the use of the master by his assent.

Also, if a man make a baylife of a manor, and after the Lord of whom the Manor is holden grant the seignorie to another, and the Bailife after payeth the rent to the grantee, that payment of the rent countervaileth no attournement though it were by fine, he shall not bind his Master, till he attorne himselfe: but if the Lord of whom the land is holden distreyn one of the seignorie, and the bailife payeth the rent to the heire of the Lord, that is a good seisin to the heire, though the bailife had no commandement of his Master to pay it. For it belongeth to his office to pay rents service, but not rent charge as some men say.

Also, an encrochment by the bailife shall not bind the Master in avowry, if he had no commandement of the master to pay it. Also if there be Lord, Meane, and tenant, and the tenant holdeth of the Meane as of his Manor of D. the Meane maketh a bailife, and after the tenant maketh a feoffement, the feoffee tendeth notice to the bailif,

and hee accepteth his rent with the arrerages, this notice shall not bind the Lord, ne compell him to alter his avowry: for the office of a bailife stretcheth not thereto, but he must have therein a speciall commandement of his Master. Also if a servant rides on his masters horse to doe an errand for his Master into a towne that hath authority to make attachuentes of goods upon plaints of debt &c. and thereupon a plaint of debt made against the servant, the Masters horse is attached by the Officers, thinking that the horse were his owne, and because the servant appeareth not the officers seise the horse as forfeit: in this case the Lord shall have an action of trespas against the officers, & this attachment for the debt of his servant, shall not bind him &c. But that an host or keeper of a Taverne shall be charged for their guests, unless it be done by their assent and commandement, I dot not remember that I have read it in the lawes of England.

Wood's f. 53

§ Whether a villaine, or a bondman may give away his goods.

Cap. 43.

IT appeareth in the said sum, called Summa Angelica, in the title Donatio prima the 9. Parograte, that a bond man, or a religious man, a Monke, ne such other that hath nothing in propre, may not give but it be by licence of their Superiour: but that saying is not, as it is said

said there, to be understood of Religious persons that have lawfull ministracion of goods, for they give with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the prelate with the counsell of the more part of the Covent abide at scholde or goe on pilgrimage, they may give as other honest scholers and pilgrims doe reasonably wont to doe: and they may also give almes where there is great need, if they have no time to aske licence.

Also if they see one in extreme necessity, they may give almes though their superiours prohibite them, for then all things be in common by the Law of God. And therefore they be bound for to doe it, as appeareth in the aforesaid sum called Summa Angelica in the title Eleemosina, the 6. Paragrafe. Doth not the Law of England agree with these diversities? &c. Forasmuch as the question is onely made whether a villaine or a bondman may give away his goods or not: and it seemeth that after the aforesaid Sum, in the title which thou hast before rehearsed, that he ne none other that hath no property may not give, whereby it appeareth that the said Summe taketh it, that a bondman should have no property in his goods, and that therefore his gift should be void, I shall somewhat touch what property and what authority a villaine hath in his goods after the Law of the Realme, and what authority the Lord hath over them. And I will leave the diversities that thou hast remembred before of Religious persons to them that list to treat fur-

further therein hereafter.

First if a Villaine have goods either by his owne proper buying and selling, or otherwise by the gift of other men, he hath as perfect a property, and also as whole interest in them, and may as lawfully give them away as any free man may. But if the Lord seise them before his gift, then they be the Lords, and the interest of the villaine therein is determined.

Also if the Lord seise part of the goods of his Villaine in the name of all the goods that the Villaine hath or shall hereafter have, that seisure is good, for all the goods that he had at the time of the seisure. But if goods come to the Villaine after the seisure, he may lawfully give them away notwithstanding the said seisure.

Also if the Lord claime all the goods of the villain, and seiseth no part of them, that seisure is void, and the gift of the Villain is good notwithstanding that seisure.

Also if a man be bound to a Villaine in an Obligation in a certaine sum of money, and the Lord seiseth the Obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the Villaine, and therefore if the Villaine releaseth the debt, the Lord is barred by that release.

Also if a woman be a niefe, and she marrieth a free man, the goods immediately by the marriage be the husbands, and the Lord shall come too late to make any seisure, and if the husband in that case maketh his wife his Executrix

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and dyeth, and the wife taketh the same goods again as Executrix to her husband, yet it shal not be lawfull for the Lord to take them from her, though she be a nieffe as she was before the marriage.

Also if goods be given to a man to the use of a Villaine, and the Lord seiseth those goods, the seisure after some men is good by the Statute made in the 19. yeare of K. H. 7 wherby it is enacted, that the Lord shall enter into lands wherof other persons be seised to the use of his villaine: and they say that the same statute shall be understood by equity of goods in use, aswell as of Lands in use.

Also if a Villaine be made a priest, yet nevertheless the Lord may seise his goods and lands as he might before: & untill the seisure he may alien them and give them away as hee might before he was priest. And in this case the Lord may order him so, that he shall doe him such service as belongeth to a Priest to doe, before any other: but he may not put him to no labor nor other businesse, but that is honest and lawfull for a Priest, to doe.

Also if a Villaine enter into Religion in his yeare of proofe, hee may dispose his goods as he might have done before he tooke the habit upon him.

And in like sorte the Lord may seise his goods as he might have done before, but if hee after make executors, and be professed, and the executors take the goods to the performance of the will, then the Lord may not seise the goods though the executors have them to the perfor-

mance of the will of him that is his villaine, nor in that case the Lord may not seise his body, ne put him to no manner of labour, but must suffer him to abide in his religion under the obedience of his superior as other religious persons doe, that be not bounden: And the Lord hath no remedy in that case for losse of his bondman, but onely to take an action of Trespas against him that received him into Religion without his licence, thereupon to recover damages, as shall be assessed by xii. men. Many other cases there be concerning the gift of the goods of a villaine, whereof I shall speake no more at this time, for this that I have said sufficeth to shew that the knowledge of the Kings Law is right expedient to the good order of conscience concerning such goods.

§ If a Clerk be promoted to the title of his patrimony, and after selleth his patrimony, and after falleth to poverty, whether shall he have his title therein or not.

Cap. 44.

In the said summe called Rosella, in the title Clericus quartus, the 24. article it is asked, if a Clerke bee promoted to the title of his patrimony, whether hee may alien it at his pleasure, & whether in that alienation the solemnity needeth to be kept, that is to be kept in alienations

nations of things of the Church: and it is answered there, that it may not be alienedno more then the goods of a Spirituall benefice, if it be accepted for a title, and expressely assigned unto him, so that it should goe as into a thing of the Church, except he have after another benefice whereof he may live. But if it be secretly assigned to his Title, some agree it may be alienedand in this case by the Lawes of the Realme, it may be lawfully alienedwhether it be secretly or openly assigned to the Title, for the Ordinary ne yet the party himselfe after the old custome of the Realme, have no authority to bind any inheritance by authority of the spirituall law: and therefore the land after it is assigned and accepted to be his title, standeth in the selfe same case to be bought, sold, charged, or put in execution, as it did before. And therefore it is somewhat to be marvelled that Ordinaries will admit such land for a title, to the intent that he that is promoted should not fall into extreame poverty, or goe openly a begging, without knowing how the common law will serve therein: for of meere right all inheritances within this Realme ought to be ordered by the Kings lawes, and inheritance cannot be bound in this Realme but by fine, or some other matter of record, or by feoffement or such other, or at least by a bargain that chargeth an use. And over that to assign a state for terme of life to him that hath a fee simple before, is void in the Lawes of England: without it be by such a matter that it worke by way of conclusion or estoppell, and in this case no

such

such matter of conclusion: and therefore all that is done in such case in alligning of the said title is void. Also there is no interest that a man hath in any Manor, Lands or Tenements for term of life, for terme of yeres, or otherwise, but that hee by the law of the realme may put away his right therein if he will. And then when this man alienath his Land generally, it were against the law of the Realme that any interest of such a Title should remaine in him against his owne sale: & there is no diversity, whether the allignement of the Title were open or secret, and so the Title is void to all intents. And in likewise if a house of Religion, or any other spirituall man that hath granted a Title after the custome used in such titles, sell all the lands and goods that they have, that sale in the lawes of England is good as against the title: and the buyer shall never be put to answer to the title. Also some say, that upon the common titles that be made daily in such case, that if he fall to poverty that hath the title, he is without remedy: for they be so made that at the common law there is no remedy for them, and if he take a suit in the Spirituall Court, many men say that a Prohibition or a Premunire lyeth. And therefore it were good for Ordinaries in such case to counsell with them that be learned in the Law of the Realme to have such a fashion devised for making of such titles, that if need be, would serve them that they bee made unto, or else let them be promoted without any title, and to trust in God, that if they serve him as they ought to doe, he will provide for them

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to have sufficient for them to live upon. And besides these cases that I have remembred before, there be many other cases put in the said Summs for the well ordering of conscience, that as me thinketh are not to be observed in this Realme, neither in Law nor conscience.

Do. Doest thou then think that there was default in them that drew the said Summs, and put therein such cases and such solutions that as thou thinkest hurt conscience, rather then to give any light to it, specially as in this Realme? St. I thinke no default in them, but I think that they were right well and charitably occupied, to take so great paine and labor as they did therein, for the wealth of the people and clearing of their conscience: for they have thereby given a right great light in conscience to all Countries where the Law Civill and the Law Canon bee used to temporall things. But as for the Lawes of this Realme they knew them not, no they were not bound to know them: and if they had known them, it would little have holpen them for the countries that they most specially made their treatises for: And in this country also they be right necessary and much profitable to all men, for such doubts as rise in conscience in divers other manners not concerning the law of the realm. And I marvell greatly that none of them that in this Realme are most bounden to doe that in them is to keepe the people in a right judgement, and in a clearenesse of conscience, have done no more in time passed to have the Law of the Realme knowne then they have done;

for though ignorance may sometimes excuse, yet the knowledge of the truth, and the true judgement is much better, & sometime though ignorance excuseth in part, it excuseth not in all: and therefore me thinketh they did very well if they would yet be callers on to have that point reformed as shortly as they could. And now because thou hast well satisfied my mind in many of these questions that I have made, I purpose for this time to make an end. Do. I pray thee yet shew me of that thou make an end moe of these cases, that after thine opinion bee set in divers bookes of learning of conscience, that as thou thinkest for lack of knowledg of the Law of the Realme, doo rather blind consciences, then give a light unto it: for if it be so, then surely, as thou hast said it would be reformed, for I think verily the Lawes of the Realme in many cases must in this Realme be observed aswell in conscience, as in the judiciall Courts of the Realme. S. I wil with good will shew to thee shortly some other questions, that be made in the said Summe, to give thee another occasion, to see therein the opinions of the said Summes, and to see further thereupon how the opinions and the Lawes of the Realme doe agree together. And yet besides these questions that I intend to shew unto thee, there bee many other questions of the said summes, that had as great need to bee more plainely declared according to the Lawes of the Realme, as those that I shall shew thee hereafter, or as I have spoken of before: but to the cases that I shall speake of hereafter I will shew thee no

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thing of my conceipt in them, but will leave it to other that will of charity take some further paine hereafter in that behalfe.

§ Divers questions taken out of the Student of the lums, called Summa Rosella, and Summa Angelica, which he thinketh necessary to be looked upon, and to be seene how they stand and agree with the law of the Realme.

Cap. 45.

THe first question is this, whether a Custome may breake a law positive, Summa Rosella. titulo Consuetudo para. 13.

The second is, if a man attainted or banished be restored by the Prince, whether shall that restitution stretch to the goods, Summa Rosella in the title Damnatus in principio.

Item, if a man be outlawed of felony, abiured, or attainted of murther or felony, or he that is an Ascismus may be slaine by strangers: and see like matter thereto. Summa Angel. in the title Ascismus para. 11.

This question is somewhat answered to, in anew addition, as appeareth before in the 14. Chapter.

Item, whether the master shall be bound by the act, or offence of his servant, or officer, Summa Angel.

Angel, in the title Dominus para. 4.

This question is answered to in an addition, as appeareth before the xlii. Chapter.

Item, whether a Villaine may give away his goods. Summa Angelica, in the title Donatio primi, para. 9.

This question is answered to in an addition, as appeareth before in the 43. Chap.

Item, whether an Abbot may give &c. Summa Angelica in the title Donatio 1. para. 10. & 30.

Item, whether a woman covert may give away any goods. And it is answered, Summa Angelica, in the title Donatio 1. parag. 11. that she may not, without hes have goods beside her dowrie, but onely in almes.

Item, if a man doe treason, whether his gift of goods after, before attainder, be good. Summa Angelica, in the title Donatio 1. para. 12. & it seemeth there may, and looke Summa Angelica, in the title Alienatio, para. 14.

Item, if a man wittingly make a contract between two kinfolke, or other that may not lawfully marry together, whether he hath forfeit his goods. Summa Angelica; in the title Donatio 1. para. 14.

Item, whether the Father may give to the sonne, Summa Angelica, in the title Donatio primi par. 19. and Summa Rosella, in the title Donatio 2. para. 42.

Item, whether a man may give above v. C. s. absque inquisitione. Summa Angelica, in the title Donatio 1. para. 20.

Item, whether a gift shall be avoided by an in-

ingratitude, Summa Rosella, in the title Donatio 1. parag. 17. & 29. and there it is said, that the gift is void by the law of nature, and look Summa Angelica, in the title Donatio prima, paragrafe 42. & 45.

Item, where any gift betweene the husband and the wife may be good, and it is said yea, when the husband giveth it, Causa remunerationis, Summa Rosella, in the title Donatio 1. para. 32.

Item, if a man make a will, & enter into religion, whether he may after revoke the wil, and it is said, that Friers Minors may not, and others may. Summa Rosella, in the title Donatio 1. para. 35. in fine.

Item, if a man give another a town with all the rights that he hath in the same, whether the patronage &c. and the tithes passe. Summa Rosella, in the title Ecclesia 1. para. 56.

Item, whether all that is bought with the money of the Church be the Churches, Summa Rosella, in the title Ecclesia 1. para. 7.

Item, if a gift made to Monastery, may bee avoided by that the giver hath children after the gift. Summa Rosella, in the title Donatio 1. para. 43.

Item, if a man buy a thing under the halfe price, whether hee be bound by the Law to restore &c. Summa Rosella, in the title Emptio & venditio, para. 6.

Item, whether a common theefe, vel communis depopulator agrorum may abjure, Summa Rosella, in the title Emunitas 2. in principio. Et habetur

hemc ibi in fine, quod licet leges excipiant plures personas tum per jus canonicum legibus derogatum est.

Item, whether a man shall take the Church for great enormitious offences that is not murther, nor felony. Summa Rosella in the title Emunitas 2. parag. 3. 11.

Item, if a man take one in the high way and draw him out, & there beateth him, whether he shall have the punishment that is ordained for them that strike one in the high way. Summa Rosella in the title Emunitas 2. parag. 6.

Item, whether he that taketh the Church may after the offence be judged to death. Summa Rosella, in the title Emunitas 2. parag. 8.

Item, whether the Bishops palle is by sanctuary. Summa Rosella in the title Emunitas par. 24.

Item, whether the dignity of the Bishop, or Priesthood discharge bondage. Summa Rosella in the title Episcopus, in principio.

Item, whether a clerk is bound to pay any Impositions, or Tollages, for his patrimony or otherwise. Summa Rosella in the title Excommunicatio 1. divisione oct. para. 4. & 5. & 6. & divisione nona, para. 1.

Item, if it were ordained by statute, that if a man sell &c. he shall give so the King li. d. whether a clerk be bound to give it if he sell of his prebend. Summa Rosella, in the title Excommunicatio, 1. divisione nona, para. 3.

Item, if it be ordained by statute that there shall not be laid upon a dead person, but such a certaine cloth, or thus many tapers, or can-

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tels, whether the statute be good, & it is left for a question. Summa Rosella, in the title Excommunicatio 1. divisione 18. para. 8. in fine.

Item, if a man make a lease of a mill for term of yeeres, & it is agreed that the lessee shal grind the lessor tolle free during the term, after the lessor is made a Earle or a Duke, & hath greater honshold then before, whether the lessee be bound there &c. Summa Rosella, in the title Familia pa. 5.

Item, if a master will not pay his servants wages, that hath served him faithfully, whether that servant may take secretly as much goods of the masters &c. and if he do, whether he be bound to restitution. Summa Rosella, in the title Familia parag. 6.

Item, things immoveable of the Church may not be given, Summa Rosella, in the title Feodum parag. 1. And see there in principio what Feodum is.

Item, whether the sons bastards, & the sons lawfully begotten shall inherite together, Summa Rosella, in the title Filius parag. 1.

Item, whether father and mother may succeed to their bastards, Summa Rosella, in the title Filius para. 4.

Item, whether the father may leave any of his goods to his bastards, Summa Rosella, in the title Filius para. 5. And Summa Rosella, in the title Societas, para. 23.

Item, whether the offence of the father shall hurt the son in temporall things. Summa Rosella, in the title Filius.

Item, if a man give all his lands and goods to his children, whether a bastard shall have any

part, Summa Roſella, in the title filius parag. 22.

Item, to whom treaſure found belongeth, Summa Roſella, in the title furtum, para. 11.

Item, if a deere, or other wild beaſt that is ſo ſore hurt that he may be taken, commeth into another mans ground, whether it be his that oweth the ground, or his that ſtrake him, Summa Roſella, in the title furtum, para. 13.

Item, whether theft be in a little thing alwel as in a great thing, Summa Roſella, in the title furtum, parag. 18.

Item, what paine a theefe ſhall have, Summa Roſella, in the title furtum, para. 22.

Item, that if goods of dead men goe to the heires, & that of damned men, ſ. De. terris. Summa Roſella, in the title Hæreditas, parag. 1.

Item, whether a man ſhall be ſaid guilty of murder by commandement, counſell, or aſſent, Summa Roſella, in the title Homicidium 2. per totum, & like matter is Homicidium 4. in principio, and in divers other caſes.

Item, a man maketh a privy contract with a woman, & after hath a child by her, & after marrieth another woman, and hath a child, he not knowing the firſt contract, which of the children ſhall be his heire. Summa Roſella, in the title Illegitimus para. 4.

Item, whether the Pope may legitimate men to temporall things, & to ſucceed, Summa Roſella, in the title Illegitimus para.

Item, if goods be found that were left of the owner as forſaken, who hath right to them, Summa Roſella in the title Inventa para. 2. And looke Summa Roſella in the title furtum, para. 1.

And thus I make an end of these questions: & because thou desirest me in the 31. Chapter, to shew thee somewhat, where ignorance excuseth in the law of the Realme, & where not, I will answere somewhat to thy question, and so commit thee to God.

§ Where ignorance of the Law excuseth in the Laws of England, and where not.

Cap. 46.

IGnorance of the law (though it be invincible) doth not excuse as to the law but in few cases: for every man is bound at his perill to take knowledg what the law of the realm is, aswell the law made by stat. as the Common law, but ignorance of the deed, which may bee called the ignorance of the truth of the deed may excuse in many cases. D. I put case that a statute penall be made, & it is enacted that the statute shall bee proclaimed by such a day in every shire, & it is not proclaimed before the day, & after the day a man offends against the statute, shall he runne in the penalty? S. I thinke yea, if there be no farther words in the statute to help him, that is to say, that if the proclamation be not made, that no man shal be bound by the stat. & the cause is this, there is no statute made in this Realme, but by the assent of the lords spirituall & temporall, & of all the commons, that is to say, by the knights of the shire, Citizens, and burgesses that be chosen & assent of the commons, which in the parliament represent the estate of the whole commons:

And every statute there made, is of as strong effect in the Law, as if all the commons were there present personally at the making thereof: and like as there needed no proclamation, if all were there present in their owne person, so the law presumeth there needeth no proclamation, when it is made by their authority, & then when it is enacted, that it shall be proclaimed &c. that is but of the favours of the makers of the statute, & not of necessity: and it cannot therefore be taken, that their intent was that it should be void if it were not proclaimed. Nevertheless some be of opinion, that if a man before the day appointed for the proclamation offend the statute, that he should not in that case be punished, for they say, that the intent of the makers of the statute shall be taken to be, that none should be punished before the day, which is a doubt to some other: But admit it be as they say, that he shall be excused, yet he is not excused by the ignorance of the Law, but because the intent of the makers excuseth him. D. It is enacted in the 7. yeare of R. 2. cap. 6. that every Sheriffe shall proclaime the statute of Winchester three times every yeare, in every market town, to the intent the offendors shall not be excused by ignorance, & it seemeth by those words, that if no proclamation be made, that the offendor may be excused by ignorance. Stu. Some take the intent of that statute to be, that the people by that Proclamation should have knowledge of the Statute of Winchester, to the intent, that the forfeiture therein may be taken as well in conscience as in law, and some take the statute to

of such effect as thou speakest of, that is to say, that no forfeiture should grow upon the statute of winchester against them that were ignorant, but proclamation were made according to the said statute of Richard. And if it be so taken, the statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: but admit it be as they say, then they that be ignorant be excused by the said particular statute, specially made in that case, and not by the generall rules of the law: and sometime in divers statutes Penalls, they that be ignorant bee excused by the selfe statute, as it is upon the statute of Richard the 2. the 13. yeare, the 2. statute, and the last Chap. where it is enacted, that if any person take a benefice by provision that he shalbe banished the realm and forfeit all his goods, and that if he be in the Realm, he avoid within 6. weekes after he hath accepted it, and that none shall receive him that is so banished after the said 6. weekes upon like forfeiture if he have knowledge: & so he that hath no knowledge is excused by the expresse words of the statute. And in like wise he that offendeth against Mag. Cha. is not excommenged, but hee have knowledge that it is prohibit that he doth. For they be onely excommenged by the sentence called Sententia lata sup cartas, that doe it willingly, or that doe it by ignorance, & correct not themselves within 15. dayes after they have warning. And sometime they that be ignorant of a Statute, bee excused from the penalty of the statute, because it shalbe taken that the intent of the makers of the sta-

tute was, that none should be bound but they that have knowledge: but that any man shall be discharged in the law by ignorance of the law only for that he is ignorant, I know few cases except it might be applied to infants that bee in their infancy, & within yeeres of discretion: for if ignorance of the law should excuse in the law, many offendors would pretend ignorance. Do. Shall an infant that hath discretion, & knoweth good from evill, be punished by a penall stat. that he is ignorant in? S. If the statute be, that for the offence he should have corporall paine, I thinke he shall be excused and have no corporall paine: but I suppose that that is not for the ignorance, for though he knew the statute, & willingly offended, yet I think he shall have no corporall paine: As where he plead Jointenancy by deed that is found against him, or if he plead a Record in Assise, and faileth of it at his day: but that is because the law presumeth that it was not the intent of the makers of the Statute, that he should have that punishment: but if he be of yeeres of discretion to know good from evill, whether he shall then forfeit the penalty of a penall statute it is more doubt, for it is commonly holden, that if an infant had not bin excepted in the stat. of fore judgement, that the forejudgement should have bound him, & so shall his cesser, & his levying of a croffe against the statute, or if he be a gardein of a prison & suffer a prisoner to escape, he shall pay the debt, because the statutes be generall, & if he should by the statutes be bound within age, like reason will that he may by a stat. penal leese his goods. D.

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If an Infant doe a murther or felony at such yeares as he hath discretion to know the law, shall he not have the punishment of the law as one of full age? S. I think yes, but that is by an old Martme of the Law, for eschewing of murders and felonies, & so it is of a trespas: but these cases run not upon the ground of ignorance, but with what acts infants shall be punishable or not punishable, for their tendernesse of their age, though they be not ignorant. Do. We not yet Knights & noblemen that are bound most properly to set their study to acts of chivalry, for defence of the realme, & husbandmen that must use tillage & husbandrie for the substance of the communalty, & that may not by reason of their labour put themselves to know the Law, discharged by ignorance of the law? S. No verily, for sith all were makers of the statute, the law presumeth that all have knowledge of that that they make, as it is said before: and as they be bound at their perill to take knowledge of the statute that they make, so be all them that come after them. And as for knights and other nobles of the Realme, me seemeth that they should bee bound to take knowledge of the Law aswell as any other within the Realme, except them that give themselves to the study and exercise of the law, & except spirituall judges, that in many cases be bound to take knowledg of the law of the realm, as is said before in Cap. 25. For though they be bound to acts of Chivalry, for the defence of the Realme, yet they be bound also to the acts of Justice, & that (it seemeth) more then other be by reason of their great possessions and

authority: and for the well ordering of the tenants servants, & neighbors, that many times have need of their helpe, & also because they be oft called to be of the kings counsell, & to the generall counsells of the realm, where their counsell is right expedient and necessary for the common wealth: and therefore if the noblemen of this Realm would see their children brought up in such maner, that they should have learning and knowledge, more then they have commonly used to have in time past, specially of the grounds & principles of the law of the Realm wherein they be inherit (though they had not the high cunning of the whole body of the law, but after such maner as M. Fortescue in his booke that he entitleth the Book de laudibus legum Angliæ, advertiseth the Prince to have knowledge of the lawes of this realm) I suppose it wou'd bee a great helpe hereafter to the ministration of Justice of this realm, a great surety for himself, and a right great gladnesse to all the people: for certain it is, the more part of the people would more gladly hear that their rulers & governors entended to order them with wisdome and justice, then with power and great terrours. But ignorance of the deed many times erreth in the Lawes of England, & I shall shortly touch some cases thereof to shew where it shall excuse, and where it shall not excuse, & then the reader may adde to it after his pleasure, and as he shall think to be convenient.

§ Certaine cases and grounds where ignorance of the deed excuseth in the laws of England, and where not.

Cap.

Cap. 47.

If a man buy a horse in open market of him that in right had no property to him, not knowing but that hee hath right, he hath good title and right to the horse, and the ignorance shall excuse him. But if hee had bought him out of the open Market, or if hee had known that the seller had no right, the buying in open Market had not excused him. Also if a man retain another mans servant not knowing that he is retained with him, the ignorance excuseth him both of the offence that was at the common law against the Wartme that prohibited such retaining of another mans servants, and also against the Statute 33. Ed. 3. whereby it is prohibit upon paine of imprisonment, that none shall retaine no servant that departeth within his term, without licence or reasonable cause: for it hath bin alway taken, that the intent of the makers of the said Statute was, that they that were ignorant of the first retainour, should not run in any penalty of the Statute. And the same Law is of him that retaineth one that is ward to another, not knowing that he is his ward. And if homage be due, and the Tenant after that the homage is due maketh a Feoffement, and after the Lord not knowing of the Feoffement distraineth for the homage, in that case that ignorance shall excuse him of his damages in a Replevin though he cannot avow for the homage: but if he had knowne of the feoffement, he should have yelded damages for the wrongfull taking. Also if a man be bound in an Obligation that he shall

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repaire the houses of him that hee is bound to by such a certaine time, as oft as need shall require, & after the houses have need to be repayred, but he that is bound knoweth it not, that ignorance shall not excuse him, for he hath bound himselfe to it, and so hee must take knowledge at his perill. But if the condition had bin that hee should repaire such houses as hee to whom he was bound should assigne, and after he assigneth certaine houses to be repaired, but he that is bound hath no knowledge of that assignment, that ignorance shall excuse him in the Law, for hee hath not bound himselfe to no reparation in certaine, but to such as the party will assign, & if he assigne none, he is bound to none: & therefore sith hee that should make the assignment is privy to the deed, hee is bound to give notice of his own assignement: but if the assignement had bin appointed to a stranger, then the obligor must have taken knowledge of the assignement at his perill. Also if a man buy Lands whereunto another hath title which the buyer knoweth not, that ignorance excuseth him not in the Law no more then it doth of goods. Also if a servant come with his masters horse to a Towne that by custom may attach goods for debt, & upon a plaint against the servant, an officer of the towne by information of the party attacheth the Masters horse, thinking that it were the servants horse, that ignorance excuseth him not, for when a man will do an act as to enter into Land, seise goods, take a distresse, or such other, hee must by the law at his perill see that that hee doth be lawfully done, as in

the

the case before rehearsed. And in like wise if a sherife by a Replevin deliver other beasts, then were distrained, though that the party that distrained shew him they were the same beasts, yet an action of tresspas lyeth against him, and ignorance shall not excuse him: for hee shall bee compelled by the law, as all officers commonly be, to execute the Kings writ at his perill, according to the tenor of it, and to see that the act that he doth be lawfully done. But otherwise it is after some men, if upon a Summons in a Præcipe quod reddat, the Sherife by information of the demandant, summoneth the tenant in another mans Lands, thinking it for the tenants land, there they say he shalbe excused: for in that case he doth not seise the Land, ne take possession in the land, but only doth summon the tenant upon the land, and the writ commandeth him not that hee shall summon the tenant upon his own land, but generally that he shall summon him, & knoweth not in what Land, and then by an old Maxime in the law it is taken, that he shall summon him upon the land in demand: and therefore though he mistake the land and be ignorant of it, yet if the Demandant informe him that that is the Land that he demandeth, that sufficeth to the Sherife as to his entry for the summoning as they say, though it bee not the tenants. And here I make an end of these questions for this time. Do. I pray thee yet or we depart take a little more paine in my desire. St. what is that? D. That thou wouldest shew me thy mind in divers cases of the Law of the realm, which (as me seemeth) stand not so clearly

with

with conscience as they should doe. And therefore I would gladly heare thy conceit therein, how they may stand with conscience. S. But the cases, I shall with good will say as I think to them.

The first question of the Doctor, How the law of England may be said reasonable, that prohibiteth them that be arraigned upon an Indictment of felony or murther, to have counsell.

Cap. 48.

M. Me thinketh that the law in that point is very good and indifferent, taking the law therein as it is. Do. Why, what is the law in this point? S. The law is as thou saist, that hee shall have no counsell: but then the Law is farther, that in all things that pertaine to the order of pleading, the Judges shall so instruct him and order him, that he shall runne into no jeopardy by his mispleading: As if he will plede that he never knew the man that was slaine, or that he had never a peny worth of the goods that is supposed that he should steal, in these cases the Judges are bound in conscience to informe him that he must take the generall issue, and plead that he is not guilty: for though they bee set to bee indifferent between the King and the party as to the party and to the principall matter, as they be in all other matters, yet they bee in in this case to see that the party take no hurt in forme of pleading in such matters,

ters, as he shall shew to be the truth of the matter, and that is a great favour of the law: for in appeale, though the Justices of favor will most commonly helpe forth the party, and sometime his Counsell also in the forme of pleading, as they doe also many times in common pleas, yet they might in those cases if they would bid the party, and his Counsell plead at their perill. But they may not doe so with conscience upon indictments as mee seemeth: for it were a great unreasonablenesse in the Law, if it should prohibit him that standeth in jeopardy of his life, that he should have no counsell, & then to drive him to plead after the straite rules, and formalities of the law, that he knoweth not. D. But what if hee bee knowne for a common offendor, or that the Judges know by examination, or by an evident presumption that he is guilty, & he asketh Sanctuary, or pleadeth Wilnosnet, or hath some Record to plead, that he cannot plead after the forme, may not the Judges in such cases bid him plead at his perill? S. I suppose they may not, for though he be a common offendor, or that he be guilty, yet he ought to have that the Law giveth him, and that he shall have the effect of his pleas, and of his matters entred after the forme of the Law: And also sometime a man by examination, and by witnesse may appeare guilty that is not. And in like wise there may be a vehement suspition that he is guilty, and yet hee is not guilty, and therefore for such suspition, or vehement presumptions me thinketh a man may not with conscience be put from that hee ought to have

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by the law, ne yet although the Judges knew it of their owne knowledge: but if it were in appeale, I suppose that the Judges might doe therein as they should thinke best to be done in conscience: for there is no Law that bindeth them to instruct him (but as they doe commonly to the parties of favor in all other cases) but they may if they will bid him plead at their perill by advice of their counsell: and if the appellee be poore, and have no counsell, the court must assigne him counsell if he aske it, as they must do in all other places, and that me thinketh they are bound to doe in conscience, though the appellee were never so great an offender, & though the Judges knew never so certainely that hee were guilty, for the law bindeth them to doe it. And so me thinketh that there is great diversity between an indictment & an appeale. And the reason why the Law prohibiteth not counsell in appeale as it doth in an indictment, I suppose is this: There is no appeale brought, but that of common presumption the appellant hath great malice against the appellee: as when the appeale is brought by the wife of the death of her husband, or by the sonne of the death of his Father: or that an appeale of robbery is brought for stealing of goods. And therefore if the Judges should in those cases shew themselves to instruct the appellee, the appellants would grutch and think them partiall, and therefore as well for the indemnity of the Court, as of the appellee in case that he be not guilty, the law suffereth the appellee to have counsell, but when that a man is indicted at the

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Kings suit, the King intendeth nothing but justice with favor, & that is to the rest and quietnes of his faithfull subjects, & to put away misdoers among them charitably, and therefore he will be contented that his Justices shall helpe forth the offendours according to the truth, as far as reason and justice may suffer. And as the King will be contented therein, it is to presume that the Counsell will be contented, and so there is no danger thereby, neither to the Court, ne to the party. And as I suppose for this reason it began that they should have no counsell upon indictments, & that hath so long continued that it is now growne into a custome, & into a maxime of the law, that they shal none have. D. But if the Judges knew of their owne knowledge that the indictee is guilty, and then he pleadeth Autrefoits, or a Record that hee was autrefoits arraigned, and acquit of the same murther, or felony, and the Judges of their owne knowledge know that the plee is untrue, may they not then bid him plead at his perill? S. I think yes, but if they know of their own knowledge that he were guilty of the murther or felony, but that the plea was untrue they knew not, but by conjecture or information, I think they might not then bid him plead at his perill.

§ The second question of the Doctor, whether warranty of the younger brother, that is taken as heire, because it is not known but that the eldest brother is dead, be in conscience a bar unto the eldest brother, as it is in the law.

Cap.

Cap. 49.

A Man seised of lands in fee hath issue two sonnes; the eldest sonne goeth beyond the Sea, and because a common voice is that he is dead, the younger brother is taken for heire, the father dyeth, the yonger brother entreth as heir, and alieneth the land with a warranty & dyeth without any heire of his body, and after the elder brother commeth again, and claimeth the land as heire to his father, whether shall he be barred by that warranty in conscience as he is in the law? St. It is a Maxime in the Law, that the eldest brother shall in that case be barred, and that Maxime is taken to be of as strong effect in the Law, as if it were ordained by statute to be a barre. And it is as old a law that such a warranty shall barre the heire, as it is that the inheritance of the father shall onely descend to the eldest son. And sith the Law is so; why then should not conscience follow the Law, as well as it doth in that point, that the eldest son shall have the land. Do. For there appeareth no reasonable cause whereupon the Maxime might have a lawfull beginning: For what reason is it that the warranty of an ancestor that hath no right to land, should bar him that hath right? And if it were ordained by Statute, that one man should have another mans land, and no cause is expressed why he should have it, in that case though hee might hold the land by force of that statute, yet he could not hold it in conscience, without there were

were a cause why he should have it, and these cases be not like as me seemeth to the forfeiture of goods by an Outlawry, for I will agree for this time, that that forfeiture standeth with conscience, because it is ordained for ministration of justice, but I cannot perceive any such case here: and therefore me thinketh that this case is like to the Maxime, that was at the common Law of wrecke of the Sea, that is to say, that if a mans goods had bin wrecked upon the sea, that the goods should have bin immediately forfeited to the King. And it is holden by all Doctors that the Law is against conscience, except in certain cases that were too long to rehearse now. And it was ordained by the statute of Westminster the 1: that if a Dogge or Cat come alive to the land, that the owner, if hee proove the goods within a yeere and a day to be his, shall have them, whereby the said Law of wrecks of the sea, is made more sufferable then it was before: and some thinke in this case that this warranty is no barre in conscience, though it be a barre in the law. S. I pray thee keep that case of wreck of the sea in thy remembrance, and put it hereafter as one of thy questions, and thereupon shew me thy further mind therein, and I shall with good will shew thee my minde: and as to this case that we be in now, me thinketh the Maxime whereby the warranty shalbe a barre, is good and reasonable, for it seemeth not against reason that a man shall be bound, as to temporall things, by the act of his ancestor to whom he is heire: for like as by the law it is ordained, that hee shall have advantage by

the same ancestor, and have all his lands by discent if he have any right, so it seemeth that it is not unreasonable, though the Law for the privity of blood that is between them suffer him to have a disadvantage by the same ancestor: but if the Maxime were, that if any of his ancestors, though he were not heire to him, made such a warranty, that it should be a bar, I think that Maxime were against conscience, for in that case there were no ground, nor consideration to prove how the said Maxime should have a lawfull beginning, wherefore it were to be taken as a Maxime against the Law of reason: but me thinketh it is otherwise in this case, for the reason that I have made before. D. If the father bind him and his heirs to the payment of a debt and dye, in that case the sonne shall not be bound to pay the debt, unlesse he have assets by discent from his father. Mut so I would agree, that if this sonne have assets by discent from the ancestor that made the warranty, that he should have the warrent but else me thinketh it should stand hardly with conscience that it should be a barre. Stu. In the case of the obligation, the Law is as thou sayst, and the cause is, for that the Maxime of the law in that case is none other, but that he shall be charged if he have assets by discent: but if the Maxime had been generall, that the heire should be bound in that case without any assets, or if it were examined by Scripture, that it should be so, I thinke that both the Maxime and the Scripture should well stand with conscience. And this may be where a man is bounden

as heire, he may enter as he that hath nothing by discent; but where he claimeth the land in his owne right, there the warranty of his ancestor shall be a bar to him, though he have no assets from the same ancestor; and though it be said in Ezechiel Ca. 18. That the son shall not beare the wickednesse of the father; that is understood spiritually. But as to temporall goods the opinion of Doctors is, that the sonne some-time may beare the offence of his father. Do. Now that I have heard thy mind in this case, I will take advisement therein till a better leasure, and will now proceed to another question. Stu. I pray thee doe as thou saist, and I shall with good will make answer thereto as well as I can.

§ The 3. question of the Doctor; If a man procure a collaterall warranty, to extinct a right that hee knoweth another man hath to land, whether it bee a barre in conscience as it is in the Law, or not.

Cap. 50.

A man is disseised of certain land, the disseisor setteth the land &c. the alienee knowing of the disseisin, obtaineth a release with a warranty of an ancestor collateral to the disseisee that knoweth also the right of the disseisee; that ancestor collaterall dyeth, after whose death the warranty discendeth upon the disseisee, whether may the alienees in that case hold the land

in conscience as he may by the law. St. Sith the warranty is discended upon him, whereby he is barred in the law, mee thinketh that he shall also be barred in conscience, and that this case is like to the case in the next Chap. before, wherein I have said that (as mee thinketh) it is a bar in conscience. D. Though it might be taken for a bar in conscience in that case, yet mee thinketh in this case it cannot: for in that case the yonger brother entred as heire, knowing none other but that he was heire of right, and after when he sold the land, the buyer knew not but that he that sold it had good right to sell it, and so he was ignorant of the title of the eldest brother, and that ignorance came by the default and absence of himself, that was the eldest brother. But in this case aswell the buyer, as he that made the collaterall warranty, knew the right of the disseisee, and did that they could to extinct the right, and so they did as they would not should have been don to themes so it seemeth that he that hath the land may not with conscience keep it. Stu. Though it be as thou saist that all they offended in obtaining of the said collaterall warranty, yet such offence is not to be considered in the law, but it be in very spectall cases: for if such alleagings should be accepted in the law, releases, and other writings should be of small effect, and upon every light surmise, all writings might come in triall, whether they were made with conscience or not. Therefore to avoid that inconvenience, the law will drive the party to answer onely whether it bee his deed or not, and not whether the deed were made

made with conscience or against conscience, and though the party may be at a mischiefe thereby, yet the law will rather suffer the mischiefe then the said inconvenience. And like law is if a woman Covert for dread of her husband by compulsion of him levy a Fine, yet the woman after her husbands death, shall not be admitted to shew that matter in avoyding of the Fine, for the inconvenience that might follow thereupon. And after the opinion of many men, there is no remedy in these cases in the Chancery: for they say that where the common law in cases concerning inheritance putteth the party from any averment for eschewing of an inconvenience that might follow of it among the people, that if the same inconvenience should follow in the Chancery if the same matter should be pleaded there, that no Subpœna should lie in such cases, & so it is in the cases before rehearsed: For asmuch veration, delay, costs and expences might grow to the party if he should bee put to answer to such averments in the Chancery, as if he were put to answer to them at the common law: and therefore they think that no Subpœna lyeth in the said cases ne in other like unto them. Nevertheless I do not take it that their opinion is that hee that bought the land in this case may with good conscience hold the land, because he shall not bee compelled by no law to restore it, but that he is in conscience and by the law of reason bound to restore it or otherwise to recompence the party, so as hee shall bee contented, and I suppose verily it is so, if hee will keepe his soul out of perill and

danger. And after some men to these cases may bee resembled the case of a fine with noncleime that is remembred before in the 14. Chap. of this booke, where a man knowing another to have right to certain land, causeth a fine to be levied thereof with proclamation, & the other suffereth v. yeres to passe without cleime, in that case he hath no remedy neither by common Law, nor by Subpœna, and that yet he that levied the fine, is bound to restore the land in conscience. And me thinketh I could right well agree that it should be so in this case, and that specially because the party himself knoweth perfectly that the said collaterall warranty was obtained by covin and against conscience.

The fourth question of the Doctor is of the wrecke of the Sea.

Cap. 52.

I Pray thee let mee now heare thy mind how the law of England concerning goods that be wrecked upon the sea may stand with conscience, for I am in great doubt of it. S. I pray thee let me first heare thine opinion what thou thinkest therein. D. The statute of Westm. 1. that speaketh of wrecks is, that if any man, dog or cat, come alive into the land out of the Ship or Barge, that it shall not be judged for wrecke, so that if the party to whom the goods belong come within a yeere and a day and prove them to be his, that he shal have them, or else that they shall remain to the King. And me thinketh

that

that the said Statute standeth not with conscience, for there is no lawfull cause why the party ought to forfeit his goods, as the King or Lords ought to have them, for there is no cause of forfeiture in the party, but rather a cause of sorrow & heavinesse: And so the law seemeth to add sorrow upon sorrow: And therefore doctors hold commonly, that he that hath such goods is bound to restitution, and that no custome may help, for they say it is against the commandement of God, Lev. 19. where it is commanded, that a man should love his neighbour as himselfe, and that they say he doth not, that taketh away his neighbours goods: but they agree that if any man have cost and labor for the saving of such goods wrecked, specially for such goods that would perish if they lay still in the water, as Suger, Paper, Salt, Weale, and such other: that he ought to be allowed for his costs and labor, but he must restore the goods, except he could not save them without putting his life in jeopardie for them, and then if he put his life in such jeopardy, the owner by common presumption had had no way to have saved them: then it is most commonly holden, that he may keep the goods in conscience: but of other goods that would not so lightly perish, but that the owner might of common presumption save them himselfe, so that might be saved without any peril of life, the takers of them be bound to restitution to the owner, whether he come within the yeare or after the yeare.

And me thinketh this case is some what like to a case that I shall put: if there were a law

and a custome in this realm, or if it were ordained by statute, that if any alien came through the realm in pilgrimage, and died, that all his goods should be forfeit, that Law should be against conscience, for there is no cause reasonable why the said goods should bee forfeit: And no more mee thinketh there is of wrecke. S. There be divers cases where a man shall lese his goods & no default in him: as where beasts stray away from a man, and they be taken up and proclaimed, and the owner hath not heard of them within the yeare and the day, though he made sufficient diligence to have heard of them, yet the goods be forfeited and no default in him: & so it is where a man killeth another with the sword of J. at Stile, the sword shall be forfeit as a Deodand, and yet no default is in the owner, and so me thinketh it may be in this case, and that vth the common Law, before the said statute, was, that the goods wrecked upon the sea, shall be forfeit to the King, that they be also forfeit now after the Statute, except they be saved by following the statute, for the Law must needs reduce the properties of all goods to some man, and when the goods be wrecked, it seemeth the property is in no man: but admit that the property remaine still in the owner, then if the owner perase would never claim, then it should not bee knowne who ought to take them: and so might they be destroyed, and no profit come of them: wherefore me thinketh it reasonable, that the Law shall appoint who ought to have them, and that hath the Law appointed to the King as Soveraigne and head

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ouer the people. Do. In the cases that thou hast put before of the stray and Deodand, there bee considerations why they be forfeit, but it is not so there: and me thinketh that in this case, it were not unreasonable that the Law would suffer any man that would take them, to take and keepe them to the use of the owner, saving his reasonable expences, and this me thinketh were more reasonable law, then to put the property out of the owner without cause. But if a man in the sea cast his goods out of the Ship as forsaken, there Doctors hold that every man may take them lawfully that will: But otherwise it is (as they say) if he throw them out for feare that they should overcharge the Ship.

S. There is no such Law in this Realm of goods forsaken: For though a man waive the possession of his goods, and saith hee forsaketh them, yet by the Law of the Realme the property remaineth still in him, and he may seise them after when he will: And if any man in the meane time put the goods in safegard to the use of the owner, I thinke he doth lawfully, and that hee shall be allowed for his reasonable expences in that behalfe, as he shall be of goods found, but he shall have no property in them, no more then in goods found. And I would agree, that if a man prescribe, that if he find any goods within his manor, that hee should have them as his owne, that that prescription were void: for there is no consideration how the prescription might have a lawfull beginning, but in this case me thinketh there is. D. what is that? S. It is this: The King of the old custome

stome of the Realme, as the Lord of the narrow sea, is bound as it is said to scower the Sea of the Pirats & petie robbers of the sea. And so it is read of the noble King Saint Edgar, that he would twice in the yeare scower the sea of such pirats: but I meane not thereby that the King is bound to conduct his Merchants upon the sea against all outward enemies, but that he is bound onely to put away such Pirats and petie robbers. And because that cannot be done without great charge, it is not unreasonable if he have such goods as be wrecked upon the sea toward the charge. Do upon that reason I will take a respit till another time.

§ The fifth question of the Doctor, whether it stand with conscience to prohibit a Jury of meat and drinke till they be agreed.

Cap. 52.

If one of the xii. men of an enquest knew the very truth of his owne knowledge, and instructeth his fellowes thereof, and they will in no wise give credence to him, & thereupon because meat and drink is prohibited them, he is driven to that point, that either he must assent to them and give their verdict against his owne knowledge, and against his owne conscience, or dye for lack of meat: how may the law then stand with conscience that will drive an innocent to that extremity, to be either forsworne, or to be famished & dye for want of meat. &c. I take not the law of the realme to be, that the Jury after

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they be ſworne may not eat nor drinke till they be agreed of the verdict: but truth it is there is a Maxime, and an old cuſtome in the law, that they ſhall not eat nor drink after they be ſworne till they have given their verdict, without aſſent and licence of the Juſtices: which is ordained by the law for eſchewing of divers inconveniancies that might follow thereupon, and that ſpecially if they ſhould eat or drink at the coſts of the parties, and therefore if they doe contrary, it may be laid in an arreſt of the judgement: But with the aſſent of the Juſtices they may both eat and drink; As if any of the Jurors fall ſicke before they bee agreed of their verdict ſo ſore that he may not commune of the verdict, then by the aſſent of the Juſtices he may have meat and drink, and alſo ſuch other things as be neceſſary for him and his fellowes alſo at their owne coſts, or at the indifferent coſts of the parties if they ſo agree, or by the aſſent of the Juſtices, may both eat and drinke: and therefore if the caſe happen that thou now ſpeakeſt of, and that the Jury can in no wiſe agree in that verdict; and that appeareth to the Juſtices by examination, the Juſtices may in that caſe ſuffer them to have both meat and drinke for a time to ſee whether they will agree, and if they will in no wiſe agree, I think that the Juſtices may ſee ſuch order in the matter, as ſhall ſeeme to them by their diſcretion to ſtand with reaſon and conſcience, by awarding of a new Enqueſt, and by ſetting fine upon them that they ſhall find in default, or otherwiſe as they ſhall think beſt by their diſcretion, and

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as they may doe if one of the Jury dye before verdict, if any other like casualties fall in that behalfe. But what the Justices ought to do in this case that thou hast put in their discretion, I will not treat of at this time.

§ The 6. question of the Doctor, whether the colors that bee given at the common Law in Assises, actions of trespas, and divers other actions, stand with conscience, because they be most commonly feined, and be not true.

Cap. 53.

I Pray thee let me heare thy mind to what intent such colors be given, and sith they bee commonly untrue, how they may stand with conscience? S. The cause why such colors be given is this: There is a Maxime and a ground of the Law of England, that if the defendant or tenant in any action plead a plee that amounteth to the generall issue, that he shalbe compelled to the generall issue, and if he will not, hee shalbe condemned for lacke of answer, and the generall issue in Assises, that he that is named the disseisor hath done no wrong, nor no disseisin. And in a writ of Entre in the nature of Assise the generall issue is, that he disseised him not. And in an action of Trespas that he is not guilty, & so every action hath his generall issue assigned by the Law, and the Tenant must of necessity either take the generall issue, or plead some plee in abatement of the writ, to the jurisdiction, to the party, or else some barre or some matter by way of conclusion. And therefore if

I. at H. infeoffee H. Hart of land, and a ſtranger bringeth an aſſiſe againſt the ſaid H. Hart, for the land, whoſe title he knoweth not: In this caſe if he ſhould be compelled to plead to the point of the aſſiſe, that is to ſay, that he hath done no wrong ne no diſſeiſin, the matter ſhould be put in the mouths of 12. lay men, which bee not learned in the law, and therefore better it is that the law be ſo ordered, that it be put in the determination of the Judges, then of lay men. And if the ſaid H. Hart in the caſe before rehearſed, would plead a barre of the aſſiſe that Jo. at Stile was ſeiſed, and enfeoffed him, by force whereof he entred and asked judgement, if that Aſſiſe ſhould lye againſt him, that plee were not good, for it amounteth but to the generall iſſue, and therefore he ſhalbe compelled to take the generall iſſue, or elſe the Aſſiſe ſhall be awarded againſt him for lack of anſwer. And therefore to the intent the matter may be ſhewed and pleaded before the Judges, rather then before the Jury, the tenants uſe to give the plaintiſe a colour, that is to ſay, a colour of action, whereby it ſhall appeare that it were hurtful to the tenant to put that matter that he pleadeth to the judgement of 12. men: & the moſt common colour that is uſed in ſuch caſe is this, when he hath pleaded that ſuch a man enfeoffed him, as before appeareth, it is uſed that he ſhal plead farther, & ſay that the plaintiſe claiming by a colour of a deed of feoffement made by the ſaid feoffor, before the feoffement made to him where no right paſſed by the deed, entred, upon whom hee entred and asked judgement if

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the Assise lie against him. In this case because it appeareth to bee a doubt to unlearned men, whether the land passe by the deed without livery or not, therefore the law suffereth the tenant to have that speciall matter to bring the matter to the determination of the Judges. And in such case the Judges may not put the tenant from the plee, for they knew not as Judges but that it is true, and so if any default be, it is in the tenant and not in the Court. And though the truth bee, that there were no such deed of feoffemennt made to the plaintife as the tenant pleadeth, yet me thinketh there is no default in the tenant, for he doth it to a good intent as before appeareth. D. If the tenant know that the feoffor made no such deed of feoffement to the plaintife, then there is a default in the tenant to plead it: for hee wittingly saith against the truth, and it is holden by all doctors, that every lye is an offence more or lesse, for if it be of malice, and to the hurt of his neighbour, then it is called Mendacium perniciosum, and that is deadly sinne: and if it be in sport, and to the hurt of no man, nor of custome used, ne of pleasure that he hath in lying: then it is veniall sin, and it is called in latin, mendacium jocosum: and if it be to the profit of his neighbour and to the hurt of no man, then it is also veniall sin, and it is called in latin, mendacium officiosum: and though it be the least of those three, yet it is a veniall sin and would bee eschewed. Stu. Though the midwives of Ægypt lyed when they had reserved the male children of the Hebrewes, saying to the King Pharao, that

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the Hebrewes had women that were cunning in the same craft, which ere they came had reserved the children alive, where indeed they themselves of pity and of dread of God reserved them; yet Saint Hierome expounding the text following, which saith, that our Lord therefore gave them houses, that is to be understood, that he gave them spirituall houses, and that they had therefore eternall reward: and if they sinned by that lye, although it were but venial, yet I cannot see how they should have therefore eternall reward. And also if a man intending to slay another, asks me where that man is, is it not better for me to lye, and say, I cannot tell where he is though I know it, then to shew where he is, whereupon murder should follow? Doct. The deed that the Midwives of Egypt did in saving the children was meritorious, and deserved reward everlasting (if they believed in God) & did good deeds belide, as it is to suppose they did, when they for the love of God, refused the death of the Innocents: and then though they made a lye after, which was but venial sinne, that could not take from them their reward, for a venial sinne doth not utterly extinct charity, but lessens the fervour that is: and therefore it may well stand with the words of Saint Hierome, that they had for their good deed eternall houses, and yet the lye that they made to be a venial sinne: but nevertheless, if such a lye that is of it selfe but venial, be confirmed with an oath, it is always mortall, if the matter be false that he sweareth. And as to the other

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question, it is not like to this question that we have in hand as mee seemeth: for sometime a man for eschewing of the greater evill may doe a lesse evill, and then the lesse is no offence in him, and so it is in the case that thou hast put, wherein because it is lesse offence to say, he wotteth not where he is, though he know where he is, then it is to shew where hee is, whereupon murther should follow, it is therefore no sinne to say he wotteth not where he is: for every man is bound to love his neighbour, and if hee shew in this case where hee is, knowing his death should follow thereupon, it seemeth that hee loved him not, ne that he did not to him as he would be done to: But in the case that wee be in here, there is no such sin eschewed: For though the party pleadeth the generall issue, the Jury may find the truth in every thing, and therefore in that he saith that the plaintife claiming in by the colour of a deed of feoffement, where nought passed, entredge. knowing that there was no such feoffement, it was a lye in him and a veniall sinne, as me thinketh. And every man is bound to suffer a deadly sinne in his neighbour, rather then a veniall sinne in himselfe.

Sc. Though the Jury upon a generall issue, may finde the truth as thou saist, yet it is much more dangerous to the Jury to enquire of many points, then to inquire onely of one point. And forasmuch as our Lord hath given a commandement to every man upon his neighbour: therefore every man is bound to force almach as in him is, that by him no occasion of offence come to

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his neighbor. And for the same cause, the law hath ordained divers maximes and principles, whereby issues in the Kings court may be joined upon one point in certain as nigh as may be, and not generally, lest offence might follow thereupon against God, & a hurt also unto the Jury, wherefore it seemeth that hee loveth not his neighbor as himselfe, ne that he doth not as he would be done to, that offereth such danger to his neighbor where he may well and conveniently keepe it from him, if he will follow the order of the law, & it seemeth that he putteth himselfe wilfully in jeopardy that doth it, and it is written Eccle. 3. Qui amat periculum, in illo peribit, that is to say, he that loveth perill shall perish in it, and he that putteth his neighbor in perill to offend, putteth himselfe in the same, and so should he doe, me seemeth, that would wilfully take the generall issue, where he might conveniently have the speciall matter: and furthermore it is no offence in Princes and rulers to suffer contracts, and buying and selling in Markets and Faires, though both perjury and deceipt will follow thereupon, because such contracts bee necessary for the common wealth: so it seemeth like wise, that there is no default in the party that pleadeth such a speciall matter to avoid from his neighbor the danger of perjury, ne yet in the court though they induce him to it, as they doe sometime for the intent before rehearsed. And in like wise some will say, that if rulers of cities & communalties, sometime for the punishment of felons, murtherers, & such other offenders will (to the intent they would have them to con-

fesse the truth) say to them that bee suspected that they be informed of such certaine defaults, or misdemeanors in the offendors, and that they doe to the intent to have them to confesse the truth, that though they were not so informed, that yet it is no offence to say they were so informed, becaus they do it for the common wealth: for if offendors were suffered to goe unpunished, the common wealth would ertsoones decay and utterly perish.

D. I will take advisement upon thy reason in this matter till another season, and I will now aske thee another question somewhat like unto this; I pray thee let me heare thy mind therein.

St. Let me heare thy question, and I shall with good will say as I think therein.

§ The 7. question of the Doctor, concerning the pleading in Assise, whereby the tenants use sometime to plead in such manner that they shall confesse no Ouster.

Cap. 54.

IT is commonly used as I have heard say that when the tenant in assise pleadeth that a stranger was seised and enfeoffed him, and giveth the plaintife a colour in such manner as before appeareth in the xlviii. Chapter, that the tenant many times when hee hath pleaded thus, and the plaintife claiming by a colour of a deed of feoffement made by the said Stranger, where nought passed by the deede, entred, and

nd that then they use to say further upon whom A. B. entred, upon whom the tenant ntred, where indeed the said A. B. never entred, ne happily there was never no such man: how can this pleding be excused of an untruth, nd what reasonable cause can be why such a leading should be suffered against the truth? The cause why that manner of pleading is ffered, is this: If the tenant by his pleading onfessed an immediate entry upon the plaintife, or an immediate putting out of the plaintife, which in French is called an ouster, then if he title were after found for the plaintife, the enant by his confession were attainted of the isseisin. And because it may bee, that though he plaintife have good title to the Land, that et the tenant is no disseisor. Therefore the tenants use many times to plead in such manner n thou hast said before, to save themselves from onfessing of an Ouster, and so if there be any efault, it is not in the Court, ne in the Law, or they know not the truth therein till it be tried: a me thinketh also that there is in this case ight little default or none in the tenant nor in is counsell, specially if the counsell know that he tenant is no disseisor. But as to that point I pray thee that thou as thou hast taken a respit to be advised, or that thou shew thy full mind in the question of a color given in Assise, whereof mention is made in the said 48. Chapter: that I likewise may have a like respit in his case till another time, to be advised, and then I shall with good will shew thee my full mind therein.

D. I am concent it be as thou saist, but I pray thee that I may yet adde another question to the 2. questions before rehearsed of the colours in assise, and feele thy mind therein, because that soundeth much to the same effect that the other do (that is to say) to proove that there be divers things suffered in the law to be pleaded that bee against the truth: and I pray thee let me hereafter know thy mind in all three questions, & thou shalt then with a good will know mine. Stu. I pray thee shew me the case that thou speakest of. D. If a man steale a horse secretly in the night, it is used that thereupon he shalbe indicted at the Kings suit, and it is used that in that indictment it shall be supposed that he such a day and place with force and armes (that is to say) with staves, swords and knives, &c. feloniously stole the horse against the Kings peace, & that forme must be kept in every indictment, though the felon had neither sword nor other weapon with him, but that he came secretly without weapon. How can it therefore be excused, but that therein is an untruth? St. It is not alleadged in the indictment by matter in deed that hee had such weapon, for the form of an indictment is this.

Inquiritur ꝑ dñe Rege, si A. tali die & Anno apud talem locum vi & armis, videlicet gladiis &c. talem equum talis hominis cepit &c.

And then if the twelve men be only charged with the effect of the bill, that is to say, whether he be guilty of the felony or not, and not whether he be guilty under such manner and forme as the bill specifieth or not: and so when

they say billa vera, they say true as they take the effect of the bill to be. And therefore if there were false latin in the bill of indictment and the Jury saith billa vera, yet their verdict is true: for their verdict stretcheth not to the truth or falshood of the latin, but to the felony: not to the form of the words, but to the effect of the matter, & that is to inquire whether there were any such felony done by the person or not: & though the bill vary from the day, from the yeare, and also from the place where the felony was done in, so it vary not from the shire that the felony was done in, and the Jury saith billa vera, they have given a true verdict, for they are bound by their oath to give their verdict according to the effect of the bill, & not according to the form of the bil. And so is he that maketh a vow bound likewise to that that by the law is the effect of his avow, and not onely to the words of his avow. And if a man avow never to eat white meat, yet in time of extreame necessity, he may eat white meat rather then dye, & not break his avow, though he affirmed it with an oath: for by the effect of his avow, extreme necessity was excepted, though it were not expresly excepted in the words of the avow: & so likewise though the words of the Bill be to inquire whether such a man such a day and yeare, and in such a place did such a felony, yet the effect of the bill is to inquire whether he did the felony within the shire or no: and therefore the Justices before whom such indictments be taken, most commonly informe the Jury that they are bound to regard the effect of the bill, and not the form.

And therefore there is no untruth in this case neither in him that made the bill, ne yet in the Jury as me seemeth. D. But if the party that owed the house bring an action of trespasse, and declareth that the defendant took the house with force and armes, where he took him without force and armes: how may the plaintife there be excused of an untruth? S. And if the plaintif surmise an untruth, what is that to the Court, or to the law, for they must believe the plaintif, till that that he saith he denied by the defendant. And yet as this case is, there is no untruth in the plaintif, to say he tooke the horse with force and armes, though he came never so secretly and without weapon, for every trespasse is in the law done with force and armes, so that if he be attainted and found guilty of the trespas, he is attainted of the force and armes: And sith the law adjudgeth every trespasse to be done with force, therefore the plaintife saith truly that he took him with force, as the law meaneth to be force. For though he tooke the horse as a felon, yet upon the felonious taking, the owner may take an action of trespasse if he will, for every felony is a trespasse and more. And so I have shewed thee some part of my mind to proove that in those cases there is no untruth, neither in the parties, neither in the Jury, nor in the Law. Nevertheless, at a better leasure I will shew thee my mind more fully therein with good will as thou hast promised me to do of the cases of colours of the Assise, and of the writes, that be before rehearsed.

§ The viii. question of the Doctor, whether the Statute of xlv. of Edward the third of Silva cedua stand with conscience. 8

Cap. 55.

In the 45. yeare of the raigne of Ed. 3. It was enacted, that a prohibition should lye where a man is impleaded in the Court Christian for Dismes of wood of the age of xx. yeare or above, by the name of of Silva cedua; how may that statute stand with conscience that is so directly against the liberty of the Church, and that is made of such things as the parliament had no authority to make any law of? S. It appeareth in the said Statute, that it is enacted, that a Prohibition should lie in that case, as it hath used to do before that time, and if the prohibition lay by a prescription before the Statute, why is not then the statute good as a confirmation of that prescription? Do. If there were such a prescription before the Statute, that prescription was bad, for it prohibiteth the payment of Tythes of trees of the age of xx. yeare or above, and paying of tythes is grounded alwell upon the law of God, as upon the law of reason, and against those laws lieth no prescription as it is holden most commonly by all men. S. That there was such a prescription before the said Stat. & that if a man before the said stat. had bin sued in the spirituall court for tythes of wood of the age of xx. yeare or above, the prohibition lay, as

Woo. fol 8.

appeareth in the said statute, and it cannot bee thought that a statute that is made by authority of the whole realme, aswel of the King and of the Lords spirituall & temporall, as of all the commons, will recite a thing against the truth: & furthermore I cannot see how it can be grounded by the law of God, or by the Law of reason, that the x. part should be paid for tith and no other portion but that, but I think that it be grounded upon the Law of reason that man should give a reasonable portion of his goods temporall to them that minister to him things shiritua l: for every man is bound to honor God of his proper substance, and the giving of such portion hath not bin onely used among faithfull people, but also among unfaithfull, as it appeareth Gen. 47. where corne was gi en to the priests in Egypt of common barns. And S. Paul in his Epistles affirmeth the same in many places, as in his first Epistle to the Cor. cap. 9. where he saith, He that worketh in the Church, shall eat of that that belongeth to the Church: And in his Epistle to the Gal. cap. 6. he saith, Let him that is instructed in spirituall things, depart of his goods to him that instructeth him: And S. Luke cap. 10. saith, That the workeman is worthy to have his hire. All which sayings may right conveniently be taken and applyed to this purpose, that spirituall men which minister to the people spirituall things, ought for their ministration to have a competent living of them that they minister unto. But that the tenth part should be assigned for such a portion and neither more nor lesse, I cannot perceive

that

that that should bee grounded by the Law of reason, nor immediately by the Law of God: for before the Law written there was no certaine portion assigned for the spirituall Ministers, neither the x. part, nor the xii. part, vnto the time of Jacob: for it appeareth Gene. 28. that Jacob avowed to pay Tithes which was among the Jewes for the x. part, if our Lord prospered him in his journey, and if the x. part had been duty before that avow, it had bin in vaine to have avowed it, and so it had if it had bin grounded by the Law of reason: and as to that is spoken in the Evangelists, and in the new law of Tythes, it belongeth rather to the giving of tythes in the time of the old law, then of the new Law, as appeareth Mathew 23. and Luke 11. where our Lord speaketh to the Pharises, saying, wo to your Pharises that tithe mints, rue, and herbs, and forget the judgment and the charity of God, these it behoveth you to doe, and the other to omit; that is to say, it behoveth you to do Justice, and charity of God, and not to omit paying of tythes though it be of small things, as of mints, rue, herbes, and such other. And also that the Pharise saith Luke 17. I pay my tithes of all that I have, it is to be referred to the old Law, not to the time of the new Law: Therefore as I take it, the paying of Tythes, or of a certaine portion to spiritual men for their spiritual ministration to the people, hath bin grounded in divers manners. First before the law written, a certain portion sufficient for the spirituall Ministers was due to them by the Law of nature, which

after

after them that be learned in the Law of the Realme is called the law of reason, & that portion is due by all laws. And in the law written, the Jewes were bound to give the x. part to their preists as well by the said vowe of Jacob, as by the law of God in the old Testament called the Judicialis. And in the new law the paying of the x. part, is by a law that is made by the Church. And the reason wherefore the x. part was ordained by the Church to be payed for the tythe, was this, There is no cause why the people of the new law ought to pay lesse to the ministers of the new law, then the people of the old Testament gave to the ministers of the old Testament: for the people of the new Law be bound to greater things then the people of the old Law were, as it appeareth Mat. 5. where it is said: Unlesse your good workes abound above the workes of the Scribes and the Pharises, ye may not enter into the Kingdome of heaven. And the sacrifice of the old law was not so honourable as the sacrifice of the new Law is: for the sacrifice of the old law was onely the figure, and the sacrifice of the new law is the thing that is figured, that was the shadow, this is the truth. And therefore the Church upon that reasonable consideration ordayned, that the x. part should be paid for the sustenance of the Ministers in the new Law, as it was for the sustenance of the Ministers in the old law, and so that law with a cause may be increased or minished to more portion or to lesse as shall be necessarie for them. Do. It appeareth Gen. 14. that Abraham gave to Melchisedech

dismes

dismes, and that is taken to be the x. part, and that was long before the law written, and therefore it is to suppose, that he did that by the law of God. S. It appeareth not by any Scripture that he did that by the commandement of God, ne by any revelation: And therefore it is rather to suppose that hee did part of duty, and part of his own free will, for in that he gave the dismes as a reasonable portion for the sustenance of Melchisedech and his ministers, he did it by the commandement of the Law of reason, as before appeareth, but that he gave the x. part, that was of his free will, because he thought it sufficient and reasonable: but if he had thought the xii. part, or the xiii. part had sufficed, hee might have given it, and that with good conscience. And so I suppose that in the new law the giving of the x. part is by a Law of the Church, and not by the Law of God, unlesse it be taken that the Law of the Church is the Law of God, as it is sometime taken to be, but not appropriately or immediatly, for that is taken appropriately to be the Law of God, that is contained in scripture, that is to say, in the old testament and in the new. Do. It is somewhat dangerous to say that tythes bee grounded only upon the law of the Church: for some men, as it is said, say that mans law bindeth not in conscience, and so they might happen to make a boldnesse thereby to deny their tythes. S. I trust there be none of that opinion, & if there be it is great pity: And nevertheless they may be compelled in that case by the law of the Church to pay their tithes alwel as they should be if paying

of

of tithes were grounded merely upon the law of God. D. I think well it be as thou saith, and therefore I hold me contented therein. But I pray thee shew me thy mind in this question. If a whole countrey prescribed to pay no tithes for corne or hay, nor such other, whether thou think that that prescription is good. &c. That question dependeth much upon that that is said before: for if paying of the x. part be by the law of reason or by the law of God, then the prescription is void, but if it be by the law of man, then it is a good prescription, so that the Ministers have a sufficient portion beside. D. Iohn Gerson which was Doctor of divinity, in a treatise that he named Regulæ morales, saith, that Dismes be payed to Priests by the law of God. &c. The words that he speaketh there of the matter be these, Solutio decimarum sacerdotibus, est de jure divino, quatenus inde sustententur: sed quoad tam hanc vel illam assignare, aut in alios redditus commutare, positivi juris existit, that is thus much to say, the paying of dismes to Priests, is of the law of God, that they may thereby be sustained, but to assigne this portion or that, or to change it to other rents, that is by the law positive: & if it should be taken that by that word Decimarū, which in English is called Dismes or tithe, that he meant the x. part, and that that x. part should be payd for tith by the law of God, then is the sentence that followeth after against that saying: for as it appeareth above, the next saith after word thus, but to assigne this portion or that, or to change it into other rents belongeth to the law positive, that is, to the law

of man, and if the x. part were assigned by God then may not a lesse part be assigned by the law of man, for that should be contrary to the law of God, and so it should be void. And me thinketh, that it is not likely that so famous a clerk would speake any sentence contrary to the law of God, or contrary to that hee had spoken before: and to prove he meant not by the term Decimæ, that dismes should alway be taken for the x. part, it appeareth in the 4. part of his works in the 32. title Lineæ, where he saith thus, Non vocatur portio curatis debita propterea decima eo quod semper sit decima pars, immo est interdum vicesima aut tricesima: That is to say, the portion due to curats, is not therefore called dismes, for that it is alway the x. part, for sometime it is the xx. or the xxx. part: so it appeareth that by this word decimarum, he meant in the text before rehearsed a certain portion, & not precisely the x. part, and that the portion should be paid to Priests by the law of God, to sustain them with, taking as it seemeth the law of reason in that saying for the law of God, as it may one way be well and conveniently taken: because the law of reason is given to every reasonable creature by God. And then it followeth pursuantly that it belongeth to the law of man to assigne this portion or that as necessity shall require for their sustenance, and then his saying agreeth well to that that is said before, that is to say, that a certain portion is due for Priests, for their spirituall ministration by the law of reason. And then it would follow thereupon, that if it were ordained for a law, that all pay-

paying of tythes should from henceforth ceasse, & that every curat should have assigned to him, such certain portion of land, rent or annuity, as should be sufficient for him, & for such ministers as should be necessary to be under him, according to the number of the people there, or that every parishioner or householder should give a certain sum of money to that use, I suppose the law were good: & that was the meaning of Jo. Gerson, as it seemeth in his words before rehersed, where he saith, but to change tithes into other rents, is by the law positive, that is to say, by the law of man. And some think that if a whole Country prescribe to be quite of both tythes of corne or grasse so that the Spirituall Ministers have a sufficient portion beside to live upon, that is a good prescription, and that they should not offend, that in such Countries payed no tythes: for it were hard to say, that all the men of Italy, or of the East parts beee damned, because they pay no tithes, but a certaine portion after the custome: therefore certain it is, to pay such a certain portion, as well they as all other be bound, if the Church aske it, any custome notwithstanding. But if the Church aske it not, it seemeth that by that not asking, the church remitteth it, & an example thereof we may take of the Apostle Paul, that though hee might have taken his necessary living of them that he preached to, yet he tooke it not, & nevertheless they that gave it him, did not offend because he did not aske it. But if one man in a town would prescribe to be discharged of tythes of corne & grasse, nee thinketh the prescription

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is not good, unlesse he can proue that he recompenceth it in another thing: for it seemeth not reasonable that he should pay lesse for his tythes then his neighbors do, seeing that the spirituall ministers are bound to take as much diligence for him, as they be for any other of that parish: wherefore it might stand with reason that hee should be compelled to pay his tithe as his neighbors do, unles he can proue that he payeth in recompence therof, more then the x. part in another thing. Nevertheless I leave the matter to the judgement of other, & then for a further proofe, though the said prescription of not paying tithes for trees of 20. yeare & above, were not good, yet that of corn & grasse should be good, some make this reason: they say, that there is no tith but it is either a predial tith, or a personall tith, or a mixt tith, and they say that if a tith should be paid of trees when they be sold, that the tith were not a predial tith, for the predial tith of trees is of such trees as bring forth fruits & increase yearely, as apple trees, nut trees, peare trees, & such other, whereof the predial tith is the apples, nuts, peares, & such other fruits as come to them yearely, & when the fruits be tithed, if the owner after sell the trees, there is no tith due thereby, for two tithes may not be paid of one thing, & of those tiths that is to say, of predial tiths was the commandement given in the old law to the Jewes, as appeareth Levit. 27. where it is said, Omnes decimæ terræ, sive de pomis arborum sive de frugibus, domini sunt, & illi sanctificatur, that is to say, all tiths of the earth, either of apples of trees, or of grains, be our lords, & to him they be sanctified,

sanctified, & though the said law, speaketh only of apples, yet it is understood of all manner of fruits. And because it saith that all the tithes of the earth be our Lords, therefore calves, lambes, and such other must also be tythed, and they be called by some men prediall tithes, that is to say, tythes that come of the ground, howbeit they call them only Predials mediate, and they be the same tythes that in this writing be called mixt tythes, and the other tythes (that is to say) tythes of apples & corne, and such other be called Predialls immediate, for they come immediately of the ground, and so do not mixt tythes, as evidently appeareth. Do. But what thinkest thou shall be the prediall tythes of ashes, elmes, sallowes, aldors, and such other trees, as beare no fruits, whereof any profit commeth, why shall not the 10. part of the selfe thing be the tythe thereof, if they be cut downe, aswell as it is of corne and grasse? St. For I think that there is to that intent great diversity betweene corne, grasse, and trees, and that for divers considerations, whereof one is this: The property of corn & grasse is not to grow over one yeare, and if it do, it will perish and come to nought, and so the cutting downe of it, is the perfection and preservation thereof, and the speciall cause that any increase followeth of the same: And therefore the tenth part of the increase shall be payd as a prediall tythe, and there no deduction shall bee made for the charges of it: And so it is of sheep and beasts that must be taken and killed in time, for els they may perish and come to nought: but when trees be felled, that felling

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is not the perfection of the trees, ne it causeth not them increase, but to decay: For most commonly the trees would be better if they might grow still. And therefore upon that that is the cause of that decay & destruction of them, it seemeth there can no prædial tyth arise: & some men say that this was the cause why our Lord in the said Chapter of Levit. 27. gave no commandement to tythe the trees, but the fruits of the trees onely. Do. It appeareth in Paralip. 31. that the Jewes in the time of the King Ezechias offered in the Temple all things that the ground brought forth, and that was trees as well as Corne & grasse. St. It appeareth not that they did that by the commandement of God, and therefore it is like that they did it of their owne devotion, and of a favour that they had above their duty to the repairing of the Temple, which the king Ezechias had then commanded to be repaired: And so that text proveth nothing that tythe should bee paid for trees: And therefore they say farther, that truth it is, that if a man to the intent hee would pay no tythe, would wilfully suffer his Corne and grasse to stand still and to perish, hee should offend conscience thereby: but though hee suffer his trees to stand still continually without felling, because hee thinketh a tythe would be asked, if he felled them (so that he doe it not of an evill will to the curate) he offendeth not in conscience, ne he is not bound to restitution therefore, as he should be if it were of corn and grasse, as before appeareth. And another diversity is this: In this case of tythe wood, the

tythe thereof would serve so little to that purpose that tythes be payed for, that it is not likely that they that made the Law for payment of tythes, intended that any tythe should be payed for trees or wood: for the spirituall ministers must of necessity spend daily and weekly, and therefore the tithes of trees or wood that commeth so seldome, would serve so little to the purpose that it should be paid for: that it would not helpe them in their necessity: So that if they should be driven to trust thereto, though it might helpe him in whose time it should happen to fall, yet it should deceive them that trusted to it in the meane time, and also should leave the Parish without any to minister to them. D. I would well agree that for trees that beare fruit there should no predial tithe be paid when they be sold (for the predial tithe of them is the fruits that come of them) and so there cannot be two predials of one thing, as thou hast said. But of other trees that beare no fruit, me thinketh that a predial tithe should be paied when they be sold, and so it appeareth that there ought to be by the constitution provinciall made by the reverend Father in God Robert Winchelsie late Archbishop of Canterbury, where it is said and declared, that Silva cedua is of every kind of trees that have being in that they should be cut. or that be able to be cut, whereof we will, saith he, that the possessour of the said woods bee compelled by the censures of the Church to pay to the Parish Church, or mother Church, the tithe as a reall or predial tithe: And so by vertue of that constitution

stitution pro the all a prediall tith must be paid of such trees as have no fruit: for I would well agree that the said constitution provinciall stretcheth not to trees that beare fruit, although the words be generall for all trees (as before appeareth.) S. I take not the reason why a prediall tith should not be payd for trees that beare fruit to be, because two prediall tithes cannot be paid for one thing: for when the tythe is paid of lambes, yet shall tythe be payd of wooll of the same sheepe (for it is paid for another increase) and so it may be said that the fruit of a tree is one increase and the felling another: But I take the cause to bee for the two causes before rehearsed, and also forasmuch as the felling is not properly an increase of the trees but a destruction of the trees, as it is said before. And farther I would heare thy mind upon the said constitution provinciall, which will, that tythe should be paid for trees by the possessors of the wood, that if the possessor sell the wood for C. l. and give the buyer a certaine time to fell it in, what tythe shall the possessor pay as long as the wood standeth? D. I thinke none, for the prediall tithe commeth not till the wood bee felled, and a personall Tythe he cannot pay, no more then if a man pluck downe his house and selleth it, or if he sell all his land, in which cases I agree well he shall pay no tithe neither personall nor prediall. S. And then I put case that the buyer selleth the wood againe as it is standing upon the ground to another for CC. l. what tithe shall he paid then? Doct. Then the first buyer shall pay tythe of the surplusage that

he taketh ouer the C. l. that he paied as a Parsonall tythe. Stu. And then if the second buyer after that cut it downe and sell it when it is cut downe for lesse then he paid, what tythe shall then be paid?

D. Then shall he that selleth them pay the tyth for the trees as a prediall tythe. S. I cannot see how that can bee, for he neither hath the trees, that the prediall tythe should be payd for, if any ought to be paid, nor he is not possessor of the ground where the trees grow: And therefore if any prediall tythe should be paid, it should be paid either by the first possessor by reason of the words of the said constitution provinciall, which be, that the tythe shalbe paid by the possessor of the wood, or by the last buyer, because he hath the trees that should be tythed, and by the first possessor the tythe cannot be paied as a prediall, for he cut them not downe, ne they were not cut downe upon his bargaine, and by the last buyer it cannot be paid neither as a prediall tythe, for the said constitution saith, that the possessor of the woods should be compelled to pay it. And therefore I suppose that the truth is, that in that case no tythe shalbe paied, for as to the last seller, he shall pay no personall tythe: for he gained nothing, as it appeareth before, and no prediall tythe shalbe paied, for it should bee against the said prescription, and also the cutting downe is the destruction of trees and not their preservation, as is said before.

D. Then takest thou the said constitution to be of small effect, as it seemeth. S. I take it to be

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of this effect, that of wood above twenty yeare it bindeth not, because it is contrary to the common law, and to the said prescription, that standeth good in the common law, but of wood under xx. yeare whereof tythe had been accustomed to be paied, the constitution is not against the said prescription, because paying of tythe under xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common law tythes should not be paid for wood under xx. yeare, no more then for above xx. yeare, and that Prohibition in that case lyeth by the common law: Nevertheless, because it hath bin suffered to the contrary, and that in many places tythe hath bin paid thereof, I passe it over, but where tythe hath not bin paied of wood under xx. yeare, I thinke none ought to be paied at this day in law nor conscience: But admit that the said constitution taketh effect for paiment of the wood under xx. yeares as of a prediall tythe, yet I cannot see how the tythe thereof should be paid by the possessor of the wood, if he sell them, but that it should be paied rather by him that hath the trees, for the constitution is, that the tythe shall be paied as a reall or prediall tythe, and that is the tenth part of the same trees, as it is of corn. And if a man buy corne upon the ground, the buyer shall pay the tythe and not the seller, and so it should seeme to bee here, and what the constitution meant to decree the contrary in tythe wood, I cannot tell, unlesse the meaning were to induce the owners to pay Tythes of great trees when they sell them to their owne use:

which me thinketh should bee very hard to stand with reason, though the said statute had never been made, as I have said before. And furthermore I would here (under correction) move one thing, and that is this; That as it seemeth that they that were at the making of the said Constitution, & knew the said prescription did not follow the direct order of charity therein so perfectly as they might have done: For when they made the said constitution provincial directly against the said prescription, they set Law against Custome, and power against power, and in a manner the Spiritualty against the Temporalty, whereby they might well know that great variance and suit should follow; And therefore if they had clerely seene that the said prescription had been against conscience they should first have moved the King and his counsell and the nobles of the realme to have assented to the reformation of that prescription, and not to make a law as it were by authority & power against the Prescription, and then to threat the people, & make them beleeve that they were all accursed that kept the said Prescription or that maintained it: & it seemeth to stand hardly with conscience to report so many to stand accursed for following of the said statute and of the said prescription as there doe, and yet to do no more then hath been done to bring them out of it. Do. Me thinketh that it is not convenient that lay men should argue the laws and the decrees or constitutions of the Church, and therefore it were better for them to give credence to spirituall rulers that have cure of their

soules then to trust to their owne opinions, and if they would doe so, then such matter would much the more rather cause then they will do by such reasonings. S. In that that belongeth to the articles of the faith, I think the people be bound to beleeve the Church, for the Church gathered together in the holy Ghost cannot erre in such things as belong to the Catholique faith: But where the Church maketh any lawes whereby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes binde them or not, for in such Lawes the Church may erre and be deceived, and deceive other, either for singularity, or for covetice, or some other cause: and for that consideration it pertaineth most to them that bee learned in the Law of the realme to know such lawes of the Church, as treat of the ordering of lands or goods, and to see whether they may stand with the lawes of the realme or not: And therefore it is necessary for them to know the Lawes of the Church that treat of Wilmes, of Executors, of testaments, of Legacies, bastardy, matrimony, and divers other, wherein they bee bound to know when the Law of the Church must be followed, and when the law of the realme; whereof because it is not our purpose to treat, I leave to speake any more at this time, and will resort againe to speake of Tythes, wherein some men say that of Tinne, Coale and Lead, no tythe should be payed when they be sold by the owner of the ground, because it is part of the inheritance,

and it is more rather a destruction of the inheritance then any encrease: And therefore they say that if a man take a Tinne work, and give the Lord the tenth dish according to the Custome, that the Lord shall pay no tythe of that tenth dish, neither prediall nor personall, but if the other that taketh the worke have gaines & advantage by the worke, it seemeth that it were not against reason that hee should pay a personall Tythe of his gaines, the charge deducted. Do. I pray thee shew me first what thou takest for a personall tythe, and upon what ground personall tythes be paid as thou thinkest, so that one of us mistake not another therein. S. I will with good will: and therefore thou shalt understand that as I take it, personall tythes be not paid for any increase of the ground, but for such profit as commeth by the labour or industry of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must be ordered after the Custome, and the Church hath not used to levy those Tythes of compulsion, but by conscience of the priests: Nevertheless Raimond saith, that it is good to pay personall tythes, or with the assent of the person, to distribute them to poore men, or els to pay a certaine portion for the whole. But as Innocent saith, where the custome is, that they should be paied, the people bee bound to pay them as well as predials, the expences deduct. Howbeit in the Church of England they use to sue for such personall tythes as well as for predials, & that is by reason of the constitution provinciall, that was made by Robert Winchelsie,

chelsie: By the which it was ordained, that personall Tythes should be paid of crafts and Merchandise, and of the lucre of buying and selling, and in like wise of Carpenters, Smiths, Weavers, Masons, and all other that worke for hire, that they shall pay tythes of their hire except they will give any thing certaine to the use, or the light of the Church, if it so please the Parson: And in another place the said Archbishop saith, that of the pawnage of Woods, and such other things, &c. and of fishings, trees, bees, doves, and of divers other things there remembred, and of crafts, and of buying and selling, and of the profits of divers other things there recited, every man should helpe satisfie competently in the Church, to the which they be bound to give it of right, no expences by the giving of the said Tythes deducted or withholden: but onely for the payment of tythes of crafts and of buying and selling: And by reason of the said constitutions provincialls, sometimes suits bee taken in the Spirituall Court for personall tythes, and thereof many men doe marvaile, because deductions many times must be referred to the conscience of the parties. And they marvaile also why a Law should bee made in this realm for paying of personall tythes, more then there is in other Countries. And here I would gladly more three farther in one thing concerning such personall tythes, to know thy mind therein, and that is, If a man give to another a horse, and he selleth that horse for a certaine summe, shall hee pay any tythe of that summe?

D. What

Do. what thinkeſt thou therein? St. I thinke that hee ſhall pay no tythe: for there as I take it, the profit commeth not to him by his owne induſtry, but by the gift of another, and as I take it, perſonall tythes be not payd for every profit or advantage that commeth newly to a man, except it come by his owne induſtry or labour, and ſo it doth not here. And alſo if he ſhould pay tythe of that he ſold the horſe for, hee ſhould pay tythe for the very whole value of the thing. And as I take it, the perſonal tythes for buying and ſelling ſhall never be payd for the value of the thing, but for the cleere gaines of the thing: And therefore I take the caſes before rehearſed, where a man ſelleth his land, or pulleth downe a houſe, and ſelleth the ſtuffe, that he ſhould there pay no tythe, that it is there to be underſtood, that he hath not land or houſe by gift or by deſcent; For if a man buy land, or buy timber and ſtuffe of a houſe, and ſell it for againe, I ſuppoſe that he ſhould pay a perſonall tythe for that gaine. And this caſe is not like to a fee or annuity granted for counſell, where the whole fee ſhall be tythed for the charges deducted, or ſome certaine ſumme for it by agreement, for there the whole fee commeth for his counſell, which is by his owne induſtry. But in the other caſe it is not ſo, and the ſame reaſon as for the perſonall tythe might be made of trees, when they deſcend or be given to any man, and he ſelleth them to another, that hee ſhall pay no perſonall tythe. Do. Me thinketh that if the horſe amend in his keeping, and then he ſell the horſe, that then the tyth ſhalbe paied

of that that the house hath increased in value after the gift, and so it may be of trees, that he shall pay tyth of that that the trees may bee amended after the gift or descent. Stu. Then the tythe must be the x. part of the increase the expences deducted, and then of trees the charges must also be deducted, for it is then a Personall tythe, and there is no tree that is so much woorth as it hath hurt the ground by the growing: therefore there can no Personall tythe be paied by the owner of the ground when he selleth them, though they have increased in his time. Never holesse I will speake no farther of that matter at this time, but will shew thee, that if Tin, Lead, Coale, or trees be sold, that a mixt tythe cannot grow thereby; For a mixt tythe is properly of Calves, Lambes, Pigs, and such other that come part of the ground that they be fed of, and part of the keeping, industry, and ouersight of the owners, as it is said before: But Tin, Lead, and Coale are part of the ground and of the freehold, & trees grow of themselves, and be also annexed to the freehold, and will grow of themselves: and also the mixt tyth must be payed yeerely at certaine times appointed by the Law or by custome of the countrey, but it may happen that Tinne, Lead, Coale, & trees shal not be felled or taken in many years, & so it seemeth it cannot be any mixt tyth, and these be some of the reasons, which they that would maintain that stat. & prescription to be good, make to prove their intent as they think.

D. What think they, if a man sel the lops of his wood, whether any tythe ought there to be paid?

S. They

St. They thinke all one law of the trees and of the lops. D. And if he use to fell the lops once in xii. or xvi. yeare, what hold they then? St. That is all one. D. And what is the reason why Tythe ought not to be paied there aswell as for wood under xx. yeare? Stu. For they say, that the lops are to be taken of the same condition as the Trees bee what time soever they be felled, and that no custome will serve in that case against the statute, no more then it should do of great trees. Do. And what hold they of the barke of the trees? Stu. Therein I have not heard of their opinion, but it seemeth to be one Law of the lops. Doct. I perceive well by that thou hast said before, that thy minde is, that if a whole Country prescribe to bee quite of Tythes of trees, corne, and grasse, or of any other tythes, that that prescription is good, so that the spirituall ministers have sufficient beside to live upon, doest thou meane so? S. Yes verily. D. And then I would know thy mind, if any man contrarie to that prescription were sued in the Spirituall Court for Corne and grasse, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy mind before the said Statute, where a man was sued in the Spirituall Court for Tythe wood.

S. I thinke nay. D. And why not there, aswell as it did where a man was sued for the tythe wood? S. For as I take it, there is great diversity betweene the cases, and that for this cause; There is a Maxime in the law of England, that if any suit be taken in the Spirituall

Court

Court whereby any goods or lands might bee recovered, which after the grounds of the law of the Realme ought not to bee sued there, though percase the Kings Court shall hold no plee thereof, that yet a Prohibition should lye, and after when it had continued long that no Tythes were paied of wood, because of the said Prohibition, and that after by proceſſe of time some Curats began to aske Tythes of woods, contrary to the Law and contrary to the said preſcription, so that variance began to riſe betweene Curats and their Pariſhioners in that behalfe: then for appeasing the said variance the said Statute was made, and that as it seemeth more at the calling on of the Spiritualty, then of the Temporalty; For the statute doth not expreſly grant that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the law: Howbeit, it doth not restraine the Common Law therein, as it appeareth evidently by the words of the Statute, and so after some men it appeareth before the statute, and also after the statute (as I have touched before) that the ſpirituall Court ought not in that case to have made any proceſſe for Tythe wood: and therefore if they did, a Prohibition lay by the common law. And like law is if the ſpirituall court make proces upon such a Legacy as by the Law of the Realme is void. As if a man bequeath to one, another mans horſe, and the ſpirituall court thereupon maketh Proceſſe to execute that Legacy, there a Prohibition lyeth: For it appeareth evidently in the libell, if all the truth appeareth in the libel, that

in

in the law of the realme the legacy is void to all intents: And that he to whom the legacy is made, shall neither have the horse nor the value of the horse. And in like wise if a man sell his land for C.l. and he is sued after in the spirituall court for tythe of the said C.l. There a prohibition shall lye, for it appeareth in that case only in the libell that no tythe ought to be payd, and that the spirituall Law ought not in that case to make any processe whereby the goods of him that sold the land might be taken from him against the Law of the Realme. And upon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that sith the statute there ought no suit to be taken for Mortuaries: and the same law is, if any suit were taken in the Spirituall Court for a new duty that is of late taken in some places upon leases of Parsonages and Vicarages, which is called Dimission noble, for it appeareth evidently in the libell if any be made thereupon, that no such Processe ought by the law of the Realme to be made in that behalfe. But in the case of Tythe corn or grasse, or such other things, wherein thou hast desired to know thy mind, there appeareth nothing in the libell but that the suite thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the party may be holpen in the Spirituall Court by the prescription: And if the case were so farre put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

Pro-

Prohibition should lye: For though the spirituall Judges in a spirituall matter deny the parties of justice, yet the Kings Lawes cannot reforme that, but must remit to their conscience: But if there were some remedy provided in that case, it were well done: For some men say, that in the spirituall court they will admit no plee against tythes. And also if a composition were made by assent of the Patron and also of the Ordinary between a Parson and one of his parishioners, that the Parson and his successors should have for a certain ground so many quarters of corn for his tyth yeerely, & after contrary to the composition of the Parson in the spirituall Court asketh tythes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put, that the composition were pleaded in the Court & were disallowed, but all resteth in the conscience of the Judge spirituall (as is said before.) Howbeit, because some be of opinion that a Prohibition should lye in this last case, therefore I will refer it to the judgement of other: But in the case of prescription, before rehearsed, I take it for the cleerer case, that no prohibition should lye as I have said before. And I beseech our Lord that this matter and such other like thereto, may be so charitably looked upon, that there be not hereafter such divisions ne such diversities of opinions therein, as hath bin in time past, whereby hath followed great costs and charges to many persons in this Realme: And that hath moved me to speake so farre in this Chapter, and in divers other Chapters in this present booke

booke as I have done: Not intending thereby to give occasion to any person to withhold his tythes that of right ought to be payed, ne to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to be payed, and by none other. And that it may also somewhat appeare that the said statute of 45. Ed. 3. was well and lawfully made, and upon a good reasonable consideration, and that the said prescription is good also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the observing thereof, ne yet of the said prescription, as it is noted by some persons that there should bee. And thus I commit thee unto our Lord, who ever have both thee and me in his blessed keeping everlastingly. Amen.

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